

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA.

APRIL TERM, 1934.

No. 6294.

598

GESELLSCHAFT FUR DRAHTLOSE TELEGRAPHIE, M.B.H.,
A Corporation,

Appellant,

v.

JOHN WILSON BROWN, III.

BRIEF ON BEHALF OF THE APPELLANT.

G. THOMAS DUNLOP,
G. W. BETTS, JR.,
FRANK J. HOGAN,
Attorneys for Appellant.

Washington, D. C.,
January 28, 1935.

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A Corporation,
Appellant,

v.

JOHN WILSON BROWN, III.

BRIEF ON BEHALF OF THE APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from a judgment for \$250,000 with interest from October 30, 1928, in favor of plaintiff below for alleged services under a written contract in securing the passage by Congress of the Settlement of War Claims Act of 1928, providing for payment of appellant's claims against the United States.

The plaintiff below, John Wilson Brown, III (hereinafter called plaintiff), is the same man who was held in *Brown v. Miller*, 52 App. D. C. 330, 286 Fed. 994 to be disqualified by reason of his former employment in

the Alien Property Custodian's office from acting as counsel for a complainant against the Custodian and the Treasurer of the United States to recover money claimed to be due from a paper company whose affairs he had supervised while in the employ of the Custodian as attorney. In the case at bar the record shows that from January 20, 1919, to May 15, 1921, he was employed in the office of the Alien Property Custodian and in the Corporation Management Division thereof as an attorney and as such had knowledge of, certain contacts with, and supervision over the affairs of the appellant (hereinafter called Telefunken) (R. 88); that prior to June 7, 1918, the Alien Property Custodian as a war measure had seized the stock of the Atlantic Communications Company, a subsidiary of Telefunken, as well as its wireless station at Sayville, Long Island, and later certain patents, and that subsequent to said seizure the Custodian had sold the property and patents belonging to Telefunken and its subsidiaries, to the United States Government for the use of the Navy Department (R. 27, 42). The record further shows that the Custodian, under date of September 4, 1919, at which time plaintiff was employed by the Alien Property Custodian as attorney, not being satisfied with the legal status created by the original seizure, decided to make a supplemental demand for the alien property and executed and issued such supplemental demands which were identified by the signature of the plaintiff. (R. 28). The record further shows that after said seizure and sale the liquidation of appellant's affairs in the hands of the Custodian was placed in charge of the Bureau of Sales in New York City where the board of directors of the Company, which had been elected by the Custodian who

owned all of the stock, nominally conducted the affairs of the Company and that all actions taken by the Company through its officers and board of directors were supervised by the office of the Alien Property Custodian in Washington, which, acting through the Corporation Management Division, in which plaintiff was employed as attorney, and at times directly through him, required and demanded that all minutes of the meetings of the Board of Directors be sent to the Corporation Management Division in Washington for supervision and filing (R. 41-44).

Brown left the office of the Alien Property Custodian May 15, 1921, and thereafter on June 22, 1922, after some preliminary negotiations, which for the purposes of this appeal are unimportant, entered into a written agreement with the appellant, in conjunction with one Alfred Frankenthaler, by which Brown and his associate undertook for a contingent fee to recover from the Alien Property Custodian, or the United States Government, the property of the appellant, and its subsidiaries, seized by the United States, or the value thereof. Pursuant to this contract and in expectation of a contingent reward therefor Brown and his associate thereafter made claims against the Alien Property Custodian and the United States Government seeking to recover the property of Telefunken or its value upon the ground that the seizure or its property had been invalid and the price paid therefor "grossly inadequate" (R. 44).

The Trial Court distinguished this case from the previous one (*Brown v. Miller, supra*) only upon the ground that in this case the Custodian had not objected to the employment (see memorandum opinion, R. 53).

Finding that they would not be able to make any headway through claims or suits against the Government, Brown and his associates subsequently determined that their only chance of recovery would be through legislation and so advised Telefunken. They claimed, and it is admitted here (R. 44), that the contract of employment, which was upon a contingent basis, contemplated the securing of legislation. They thereupon set out to secure from Congress such legislation and their efforts and activities in this connection, so far as they are pertinent to this appeal, are embraced in the statement of the evidence contained in the bill of exceptions. It is obvious that many of these activities were of a nature characterized by the courts as "lobbying," compensation for which is not sanctioned by the law, whether upon a contingent basis or otherwise.

The contract of employment provided for its termination by Telefunken at any time, provided that at the time of revocation a fair and reasonable fee be paid for services rendered to the date of termination (R. 77).

Congress enacted the Settlement of War Claims Act of 1928, approved March 10, 1928, by which an arbitral tribunal was set up for the determination of rights and equities growing out of seizures of alien property and other matters, and providing for compensation for same, by the terms of which Telefunken was enabled to present to such tribunal its claims to reimbursement or compensation.

After the passage of this Act but before any claims had been presented to the tribunal Telefunken terminated the employment contract with Brown and his associate who immediately made claim for compensa-

tion under the provisions of the agreement. No satisfactory adjustment of their differences being reached, Brown brought an action for recovery of compensation under the provisions of the agreement and after trial before the Court without a jury and after the Trial Court had made certain findings of fact and conclusions of law, certain of which exceptions were duly noted by the defendant below, judgment was rendered for the plaintiff in the full amount claimed, from which judgment this appeal was taken.

ASSIGNMENT OF ERRORS.

(See Record, pp. 55-66.)

The court erred:

1. In failing and refusing to find as matter of fact as requested by the defendant that:

“The Frankenthalers had called the plaintiff, Brown, into the situation because they had learned that he had a knowledge of the law with reference to the Alien Property situation and was familiar with the practice and because they, the Frankenthalers, knew nothing about the Trading with the Enemy Act; and knew no one who did; that they, the Frankenthalers, did not know, however, that the plaintiff had had anything to do with the Sayville Wireless Station or Telefunken matters while he was in the Alien Property Custodian's Office.”

2. In finding as a matter of fact that:

“This case (Atlantic Communication Company), however, had been referred to the New York Office for liquidation before the appointment of Mr. Brown and the Corporation Management Division had no part in the matter thereafter.”

3. In failing and refusing to find as a matter of fact as requested by the defendant that:

“He (Brown) customarily read and examined the records and minutes of the meetings of the stockholders and directors of the companies and ordered them filed.”

4. In failing and refusing to find as a matter of fact as requested by the defendant that:

“There was prepared in the Corporation Management Division of the Alien Property Custodian's Office in Washington, D. C., identified by the signature of the plaintiff, a document known as a supplemental demand, demanding the transfer of stock previously seized on the books of the Atlantic Communication Company into the name of the Custodian.”

5. In failing and refusing to find as a matter of fact as requested by the defendant that:

“One reason for the supplemental demand was that the Custodian had the right, as to all capital stock that he had seized, to all the rights of a stockholder. At the start he had only been given the right to seize the stock. It was thereafter thought necessary for the Custodian to redemand the stock that he had seized so that there might be no possibility of a slip-up on his right to that stock. It was to confirm his title, and possibly to embrace further rights in the exercise of the control of the stock, and also that the Custodian's own signature should be on the demand, so that there might be no question as to his right to delegate that power to his subordinates.”

6. In failing and refusing to find as a matter of fact as requested by the defendant that:

“The plaintiff was in office on September 4th, 1919, in the capacity described when the supplemental demands, which bore the signature of the plaintiff, were made in the case of the Atlantic Communication Company.”

7. In failing and refusing to find as a matter of fact as requested by the defendant that:

“The Alien Property Custodian and the Atlantic Communication Company joined in a conveyance of defendant's patents to the United States, thereby assigning all the rights that might relate to both the Custodian and the Atlantic Communication Company.”

8. In failing and refusing to find as a matter of fact as requested by the defendant that:

“Pursuant to such request (see letter Aug. 14, 1919, p. 165 Bill of Exceptions), the minutes referred to were sent to the office of the Alien Property Custodian and were referred to plaintiff, who customarily examined and read such minutes before sending them to the files.”

9. In failing and refusing to find as a matter of fact as requested by the defendant that:

“Further and subsequent correspondence between the Corporation Management Division of the Alien Property Custodian in Washington and the officers of the Atlantic Communication Company and the New York Patents Exploitation Corporation, and the Bureau of Sales in New York, of a similar nature, and also concerning the affairs of these companies in other respects, was either conducted by the plaintiff or received his attention.”

10. In failing and refusing to find as a matter of fact as requested by the defendant that:

“Amongst the matters and affairs of the Atlantic Communication Company which came to the attention and under the supervision of plaintiff while he was employed as an attorney in the office of the Alien Property Custodian were the terms and methods of sale, the deeds and other documents affecting the conveyance, and the corporate actions with respect to the sale of the patent interest, patent rights, real estate and other properties of the said Company to the United States, under the direction of the Alien Property Custodian; the release to the United States of any and all claims and demands which the Atlantic Communication Company then or ever had against the United States on account of the seizure of its property or infringement or use of its patents, patent rights or licenses or otherwise; a list of the patents owned by defendant, Telefunken, and licensed to Atlantic Communication Company; the seizure and appropriation by the Alien Property Custodian of the right, title and interest of the defendant, Telefunken, in a mortgage on the real estate, wireless station and apparatus of the Atlantic Communication Company at Sayville, Long Island.”

11. In failing and refusing to find as a matter of fact as requested by the defendant that:

“The question of the adequacy or inadequacy of the price paid by the United States for the patents, patent rights and the property of the Atlantic Communication Company, the New York Patents Exploitation Corporation, and the defendant, was therefore a matter for consideration by the Corporation Management Division in which plaintiff was employed, and he at least had the oppor-

tunity to know and appraise the facts in the matter from the minutes of the Company when they came to his attention, as they did, if indeed it was not his duty to satisfy himself as to the propriety of the actions of the directors and officers in that regard."

12. In failing and refusing to find as a matter of fact as requested by the defendant that:

"It was the duty of the attorney to whom a company was allocated in the Corporation Management Division to ascertain whether the minutes of the Company's meetings had been filed in Washington so that the Custodian would have knowledge of exactly what corporate actions had been taken. He would find out if the stock had been properly seized and could be sold and transferred without any cloud on it. He would ascertain if an accounting was being made and the status of that. If the directors were not proceeding as rapidly as seemed advisable, the Corporation Management Division would urge the representatives of the Company to speed things up, and the attorney to whom the Company was allocated would originate that."

13. In failing and refusing to find as a matter of fact as requested by the defendant that:

"Plaintiff made frequent trips to New York to the Bureau of Sales there in connection with the affairs of the companies which were referred to him, and for a considerable time he was the only attorney in the Corporation Management Division."

14. In finding as a matter of fact that:

"He (Brown) had nothing to do with and no contact while in the office of the Alien Property

Custodian with the case of Telefunken, as distinguished from that of Atlantic Communication Company, nor anything to do with such seizures or supplemental seizures as there may have been of the patents owned by Telefunken, nor with their conveyance to the Navy Department."

15. In finding as a matter of fact that:

"The procedural regularity of what had been done by the Alien Property Custodian and his nominees the officers and directors of the Atlantic Communication Company, was at no time brought into question either by Telefunken or by the plaintiff and his associates or by the attorneys who succeeded them as attorneys for Telefunken."

16. In failing and refusing to find as a matter of fact as requested by the defendant that:

"As late as January 24th, 1925, (as shown by letter of that date from the plaintiff to his associates, Alfred and George Frankenthaler) it was contemplated and proposed that two suits be instituted in the interest of Telefunken and its subsidiaries, (The Atlantic Communication Company and the New York Patents Exploitation Corporation) to set aside the sale and conveyance of the properties of these companies to the United States Government, which had been effected under the direction and control of the Alien Property Custodian upon the ground that the consideration for such sale or sales was grossly inadequate. It was stated, with respect to the first suit, that the true beneficial ownership of a very valuable patent (the Vreeland patent) was in the defendant Telefunken, subject to an agreement between Telefunken and the Atlantic Communication Company, giving the latter the right to use all the patents of Telefunken; that the Custodian's joinder

in the passage of title to this patent to the American Telephone and Telegraph Company, was invalid and was void under the terms of the Trading with the Enemy Act; that it was a complete nullity and could be set aside. He proposed that both suits would be brought by Telefunken against the American Companies (the Atlantic Communication Company and the New York Patents Exploitation Corporation), which were owned by and were under the control of the Alien Property Custodian. As to the second suit, he proposed that since the assets of the Atlantic Communication Company were 'slaughtered' by the sale of its assets under the control of the Alien Property Custodian 'to the detriment of the capital stock', a bill could be filed by Telefunken as creditor, although its interests as a stockholder would be shown in the bill as well as the invalidity of the Custodian's action; that such bill could be brought by Telefunken as a creditor of Atlantic Communication Company since Telefunken held mortgages on the property of the Atlantic Communication Company, securing the payment of some Three Hundred and ten thousand Dollars (\$310,000.00), which mortgage was released by the Alien Property Custodian to the United States in connection with the sale of the physical property; that such transaction constituted a gift of enemy property to the United States, whereas the law required that it must be sold for a fair value, and therefore the Custodian's conveyance was invalid; that such a conveyance by the Custodian, although in form effected by the corporation, was totally void even in the absence of actual fraud or conspiracy, because the corporation, the Atlantic Communication Company, except for such assets which had been sold by the Custodian, was insolvent; and because it constituted the sale of the entire assets of a going concern and was therefore void as to creditors, of which Telefunken was one; that such a bill

brought by Telefunken as creditor to set aside the conveyance of the assets real and personal, made by the Atlantic Communication Company under the direction of the Custodian would have good chance of success; that he had drafted a bill for this purpose; that the second cause of action should be presented jointly with the first in order to show the whole background of what had been done and open up the whole question, while openly attacking only two particular phases of it."

17. In failing and refusing to find as a matter of fact as requested by the defendant that:

"About one year after the termination of plaintiff's employment in the office of the Alien Property Custodian, to wit, under date of June 22nd, 1922, plaintiff, together with an associate, Alfred Frankenthaler (the latter being represented and associated in the negotiations for, and in subsequent performance under, said agreement by and with his brother George Frankenthaler) jointly entered into a written agreement with the defendant to represent the defendant as its attorneys for the purpose of recovering to the defendant the properties of the defendant and its said subsidiaries, the Atlantic Communication Company and the New York Patents Exploitation Corporation, or the true value thereof, which had been so seized and sold to the United States Government, upon the ground that such sale or sales by or under the direction of the Alien Property Custodian had been at grossly inadequate prices and without adequate or proper authority and were therefore void."

18. In failing and refusing to find as a matter of fact as requested by the defendant that:

"The basis of the recovery to be sought by the plaintiff and his associates under the provisions

of the aforesaid contract was the fact that the defendant's properties, which had been seized, had been sold by or under the direction of the Alien Property Custodian to the United States Government at an inadequate price."

19. In failing and refusing to find as a matter of fact as requested by the defendant that:

"Claims or suits against the Alien Property Custodian or the United States Government on behalf or in the interest of the defendant were contemplated by the plaintiff and his associates as possible remedies to be pursued in their performance of the aforesaid agreement."

20. In failing and refusing to find as requested by defendant that:

"The plaintiff, Brown, having acted as an attorney for the Alien Property Custodian of the United States in relation to the affairs of defendant, Telefunken, and its subsidiaries, the Atlantic Communication Company and the New York Patents Exploitation Corporation, involving the seizure of their properties and their sale to the United States, could not thereafter lawfully represent the defendant, or its subsidiaries in claims against the Alien Property Custodian, or his principal, the United States, arising out of the same matters, or use, in relation to any claim against the Alien Property Custodian, or his principal, the United States, in the interest of Telefunken, any information with respect to Telefunken or its subsidiaries which he obtained, or to which he had access, while so employed by the Alien Property Custodian."

21. In failing and refusing to find as requested by defendant that:

“The contract of June 22nd, 1922, between Alfred Frankenthaler and John Wilson Brown, III, on the one hand, and Telefunken on the other and any parol or implied agreement between said parties looking to the recovery of the property of Telefunken, or its subsidiaries, which had been seized by or on behalf of the Alien Property Custodian and sold to the United States, or compensation for such property, upon the ground that the same had been so sold at an inadequate price, is void as against public policy by reason of plaintiff's former employment as attorney for the Alien Property Custodian, with respect to the matters and affairs of the defendant in connection with such seizure and sale of its properties.”

22. In failing and refusing to find as requested by defendant that:

“The contract of June 22, 1922, between Alfred Frankenthaler and John Wilson Brown, III, on the one hand, and Telefunken on the other, and any parol or implied agreement between said parties, looking to the recovery through remedial legislation of compensation to the defendant or its subsidiaries for their property which had been seized and sold to the United States, was void as against public policy by reason of the contingent character of the consideration to be paid.”

23. In failing and refusing to find as requested by defendant that:

“Any employment of plaintiff and his associates to recover compensation for defendant through remedial legislation for a contingent fee, whether such employment was by an express written agreement, or otherwise, was against public policy and any agreement for such employment was void, and no recovery can be had as compen-

sation for services performed in connection with such employment.”

24. In failing and refusing to find as requested by defendant that:

“The said contract being void, neither the plaintiff nor any of his associates, all of whom were in privity with him, could acquire any rights thereunder.”

25. In failing and refusing to find as requested by defendant that:

“The court will not lend its aid to enforce any such contract of employment which was against public policy.”

26. In failing and refusing to find as requested by defendant that:

“The court will not lend its aid to enable plaintiff to recover compensation for professional services performed by others for him or in association with him when such services could not lawfully have been performed by plaintiff himself.”

27. In failing and refusing to find as requested by defendant that:

“The contract for professional employment of June 22nd, 1922, which was void as to plaintiff, Brown, by reason of his prior employment by the Alien Property Custodian, being a joint undertaking by plaintiff and Alfred Frankenthaler, was void also as to Alfred Frankenthaler, since neither the services to be performed nor the compensation to be received were severable and also because Alfred Frankenthaler was in confidential relations with his associate, Brown, and in all respects in privity with him.”

28. In failing and refusing to find as requested by defendant that:

“The Court cannot recognize any cause of action attempted to be created by the alleged assignment from George Frankenthaler and Alfred K. Nippert to the plaintiff, Brown, for compensation for services rendered as associates of plaintiff in connection with his contract; there being no privity between Telefunken and such associates, and such associates being employees of plaintiff and his co-contractor Alfred Frankenthaler.”

29. In failing and refusing to find as requested by defendant that:

“Such services as were rendered by the plaintiff and/or his associates in the furtherance of legislation in consideration of the promise of a contingent interest in any recovery of defendant resulting from such legislation cannot be made the basis of a valid cause of action, since such compensation and agreements therefor are against public policy.”

30. In failing and refusing to find as requested by defendant that:

“Plaintiff cannot recover under the third count of his declaration if such count declares upon an implied assumpsit, because the testimony discloses no services performed by either the plaintiff or his associates except under the express agreement mentioned in the first and second counts of the declaration.”

31. In failing and refusing to find as requested by defendant that:

“Since such services as were performed by plaintiff and his associates in the furtherance of

legislation were contemplated by and performed under and with reference to the provisions of the written agreement of June 22nd, 1922, there can be no recovery in this action independently of that agreement."

32. In failing and refusing to find as requested by defendant that:

"The plaintiff, having entered into a contract which is void as against public policy, and the plaintiff and his associates having performed no services except as contemplated by said contract, cannot recover in this action."

33. In failing and refusing to find as requested by defendant that:

"Plaintiff is not entitled to any recovery from the defendant for the services of himself or his associates."

34. In failing and refusing to find as requested by defendant that:

"The plaintiff cannot recover against defendant for any services of himself or his associates, claimed to have been performed in connection with defendant's claim for the return of \$10,000.00 by the Alien Property Custodian under the Statute of the United States known as the Winslow Act for the reason that any such services were covered by the provisions of the contract of June 22nd, which was void."

35. In finding that:

"I find that the plaintiff is entitled to recover of the defendant the sum of \$250,000.00, with interest from the date of the institution of this action. In my opinion the action is not barred by

the fact that the plaintiff had been an attorney of the Alien Property Custodian, and had been connected with the administration of the properties of the defendant seized by the Custodian. This defense is not one raised by the Custodian, and in fact the Custodian raised at no time any objection to the employment of plaintiff by the defendant.

“The contract between the parties was not on its face a ‘lobbying’ contract for ‘influence’ to be used upon members of Congress, but for services which were legitimate, and was not void as against public policy.

“In fixing the amount of the fee due the plaintiff, I have taken into consideration the amount of the ultimate recovery, both because in my opinion, that should be considered in estimating the value of the plaintiff’s services, and also as evidence of the amount in controversy, while the plaintiff was acting as attorney for the defendant.

“The several motions of the defendant made at the oral argument and as set out in the written motion filed June 1st, 1933, will be overruled.”

36. In holding that the action is not barred by the fact that the plaintiff had been an attorney of the Alien Property Custodian and had been connected with the administration of the properties of defendant seized by the Custodian because the defense resting upon public policy was not one raised by the Alien Property Custodian and because the Custodian made no objection to the employment of plaintiff by the defendant.

37. In holding in effect that the Alien Property Custodian could waive and did waive the question of public policy involved in the employment of the plaintiff and his associates as attorneys for the prosecution of claims against the Alien Property Custodian and/or

the United States in connection with matters which had been under the jurisdiction of plaintiff while in the employ of the Alien Property Custodian as an attorney at law.

38. In holding in effect that because the contract in question on its face was not a "lobbying" contract for influence to be used upon members of Congress in forwarding and securing legislation for a contingent fee was not void as against public policy.

39. In taking into consideration in fixing the amount of the compensation to which plaintiff was entitled, the amount of the ultimate recovery of defendant; thus in effect permitting plaintiff to recover compensation for forwarding and securing legislation upon a basis contingent on the amount recovered by defendant through such legislation.

40. In taking into consideration the amount of the ultimate recovery of defendant in estimating the value of plaintiff's services, although at the time of cancellation of the contract in question in accordance with its terms and at the option of the defendant as provided by the contract, the amount of any compensation to which the plaintiff and his associates might have been entitled was to be determined as of that date by the value of such services as they had then rendered and whereas no recovery had been made by plaintiff at that time nor was any had until years afterwards and then without further assistance from plaintiff and/or his associates and although at the time of the cancellation of the contract the value of defendant's property rights involved were entirely unknown.

41. In holding that the plaintiff could recover against the defendant upon the contract in question, although it contemplated the furthering or securing of legislation for a contingent fee.

42. In finding that plaintiff was entitled to recover for services which were in fact "lobbying" in character performed in contemplation of a contingent reward provided for in the contract of employment.

43. In giving judgment for the plaintiff.

The exceptions and assignments of error raised the following questions of law as the more important and controlling questions to be determined by this Court:

1. Was Brown's employment by Telefunken contrary to public policy and the contract therefore void by reason of his prior employment by the Alien Property Custodian under the circumstances appearing in this record?

2. Was any agreement between Brown and Telefunken for employment to secure legislation for a contingent interest in the recovery to be obtained thereby void as against public policy?

3. Can there be any recovery by Brown and his associates for services in obtaining legislation which included "lobbying" activities which in this record it appears that they engaged in?

ARGUMENT.**I.**

Brown's Employment by Telefunken Was Contrary to Public Policy and the Contract Therefore Void by Reason of His Prior Employment by the Alien Property Custodian Under the Circumstances Appearing in This Record.

It would seem beyond question that Brown was disqualified, as a matter of public policy, from accepting employment to enforce through legal proceedings, or otherwise, against his former employer, the Alien Property Custodian or his principal, the United States, any rights which Telefunken might have had as the result of any seizure and sale of its property by the Alien Property Custodian, since Brown, while employed as an attorney in the Office of the Alien Property Custodian, had by reference to him, or under his supervision and within his knowledge, the affairs of Telefunken, including this very matter of the seizure and sale of its radio station and patents; the recovery of which, or their value, was the very purpose of the agreement.

The invalidity of such representation against the Alien Property Custodian, or his principal, the United States, Brown's former employer or client, has been conclusively established by this Court in the case of *Brown v. Miller*, 52 App. D. C. 330, 286 Fed. 994. The plaintiff in that case was the plaintiff in this, and the pertinent facts with relation to his employment as attorney in the Office of the Alien Property Custodian, and his relation to and knowledge of the affairs of the Paper Company in that case and of Telefunken in this, whose capital stock, property and assets had been

seized and sold by the Alien Property Custodian, are substantially identical. The attention of the Court is respectfully called to the transcript of record in the above entitled case, being No. 3823 in this Court, which was filed May 24, 1922. Just as it appeared in that case, he was in this case an attorney duly admitted to practice before the Courts of the District of Columbia and was employed as attorney in the Office of the Alien Property Custodian.

The facts with relation to the affairs of Telefunken in the Office of the Custodian and Brown's connection with them while he was there appear in the Court's Findings of Fact as follows (R. 27):

Court's Finding of Fact No. 3:

"In February, 1917, Telefunken owned all of the capital stock of the corporation Atlantic Communication Company, organized under the laws of the State of New York. This corporation held title to the land and structure known as the Sayville Long Island Wireless Station. Telefunken in its own name and in the name of Karl George Frank held mortgages on this property amounting to approximately \$300,000. Defendant then owned a large number, approximately 76, of very valuable patents and applications for patents relating to wireless transmission and reception. With exceptions hereinafter noted, so far as material, the title to these patents was in Telefunken which had in 1913 granted a license of them to Atlantic Communication Company. The license agreement contained a provision for its termination in case of violation of it and contained an express provision that the Atlantic Communication Company should not assign the license in whole or in part.

"In 1915, the United States Government, through the Navy Department, on complaint of

unneutral communications, had installed censors in the Sayville plant. In February, 1917, upon the declaration of the policy of unrestricted submarine warfare on commerce, the Navy Department commandeered and seized the wireless station and patents and took charge of the operation of it. Prior to June 7, 1918, the Alien Property Custodian had seized the capital stock of the Atlantic Communication Company and installed his own directors and officers. In October, 1918, the Atlantic Communication Company, acting through the officers installed by the Alien Property Custodian, conveyed its real estate and other property and attempted to assign its rights as licensee to the patents to the United States, the Navy Department, for a consideration of approximately \$144,000, part of which was paid directly on the mortgages, that is, to the Alien Property Custodian. In January, 1919, the Alien Property Custodian seized the rights of Telefunken in the patents and its rights as licensor under the agreement of February, 1913, with the Atlantic Communication Company with regard to the patents and again seized its stock control of Atlantic Communication Company."

These patents were seized by the Custodian by service on the Atlantic Communication Company and by demand filed in the Patent Office at Washington against Telefunken itself, which operated as a conveyance of the patents. The Custodian and the Atlantic Communications Company then joined in a conveyance to the United States. These conveyances were in the fall of 1918 and February 6, 1919 (R. 111).

As appears elsewhere in this record (Court's Findings of Fact No. 23, R. 43, and No. 12, R. 39), Brown was employed in the Office of the Alien Property Custodian at this time, having entered upon his employment on January 20, 1919.

Court's Finding of Fact No. 3, continued (R. 28) :

“On February 5 and 6, 1919, the Atlantic Communication Company attempted again to assign all its rights under the license agreement of February, 1913, and the Alien Property Custodian sold and assigned all of the rights of Telefunken in the patents to the United States, represented by the Secretary of the Navy. The patents had been conveyed to the United States by the close of the period covered by the Alien Property Custodian's Report of 1918, which was the close of business February 15, 1919. Subsequently the Bureau of Law of the office of the Alien Property Custodian ruled that the Custodian did not have the right to delegate the power of executing demands for stock to any subordinate or other official. A great number of original demands had gone out executed by the managing director of the Custodian's office. An act amending the Trading with the Enemy Act had been passed giving the Custodian the right to exercise all of the rights of a stockholder as to all of the capital stock he had seized. For these reasons the Alien Property Custodian issued supplemental demands in all cases of stock seizure and such a supplemental demand was issued with regard to the capital stock of the Atlantic Communication Company, under date of September 4, 1919. Title to a few, probably three patents, had been placed by Telefunken in a corporation formed after the beginning of the War, known as the New York Patents Exploitation Company. Such title as this corporation had was by similar proceedings and for the same consideration vested in the United States, the Navy Department.”

Court's Finding of Fact No. 15 (R. 42) :

“In the performance of his duties, and because the stock of the Atlantic Communication Company

and of the New York Patents Exploitation Corporation, subsidiaries of the defendant herein, *was owned by the defendant, an alien enemy, the Custodian was required to and did take charge of the administration of the property and affairs of the said Atlantic Communication Company and of the said New York Patents Exploitation Corporation, and in due course caused the property of the Atlantic Communication Company, consisting of a wireless station at Sayville, Long Island, and certain patents, to be sold to the United States Government, and received the avails of such assets."*

Court's Finding of Fact No. 16 (R. 43):

"In due course the Custodian also caused certain patents, which were the property of the New York Patents Exploitation Corporation and others owned by the defendant, to be sold to the United States Government, and received the avails thereof."

Court's Finding of Fact No. 17 (R. 43):

"In the administration of the affairs of the said Atlantic Communication Company and the said New York Patents Exploitation Corporation, the Custodian caused to be issued to himself certificates representing substantially all of the shares of said companies, and selected the Boards of Directors which managed and controlled them under him until their final liquidation."

Court's Finding of Fact No. 18 (R. 43):

"The Custodian in effect sustained to the said Atlantic Communication Company and the said New York Patents Exploitation Corporation the relation of manager."

Court's Finding of Fact No. 12 (R. 39):

"The affairs of the Atlantic Communication Company were taken in charge on behalf of the Alien Property Custodian by Mr. Bradley Palmer, associate general counsel of the Custodian, and Francis P. Garvan, then the head of the Bureau of Investigation for the Alien Property Custodian, sometime prior to June, 1918, at which time the actual operation of the station was by the Navy Department. At that time all of the stock of the corporation had been seized or transferred to the Alien Property Custodian. They placed in charge of the affairs of the corporation with themselves, John C. Tomlinson, Jr., an attorney then in the employ of the Alien Property Custodian, who became Secretary and Director, James A. Delahanty, of New York, who became counsel of the Company, and Ramsey Houget, who became patent counsel of the corporation. The affairs of the corporation were thereafter administered exclusively from the New York office of the Alien Property Custodian and those in charge of its corporate affairs reported directly to the Alien Property Custodian, A. Mitchell Palmer. There were no consultations with or instructions from the Washington office of the Alien Property Custodian, excepting with and from Messrs. Palmer and Garvan."

Court's Finding of Fact No. 19 (R. 43):

"Under the direction of the Custodian, the plaintiff attended to certain of the matters of the said Companies, wrote, received and examined letters and papers touching the closing up of their affairs, and had the right of access to all the documents and files of the said Companies that were in the Custodian's Office in Washington, D. C."

Court's Finding of Fact No. 20 (R. 43):

“Plaintiff sustained the relation of attorney to the Custodian concerning the Atlantic Communication Company's matters, and the New York Patents Exploitation Corporation's matters.”

Court's Finding of Fact No. 21 (R. 43):

“He had an intimate knowledge of the method of doing business in the Custodian's Office, and while there employed he always had access to any files therein.”

Court's Finding of Fact No. 22 (R. 43):

“Some of the documents in the Custodian's Office which came under plaintiff's attention related to the seizure by the United States Government, or its agents, and the sale to the United States Government of the property of the said Atlantic Communication Company and the said New York Patents Exploitation Corporation, whose certificates of capital stock had been seized and were held by the Alien Property Custodian.”

Court's Finding of Fact No. 23 (R. 43):

“The plaintiff was employed from January, 1919, to May 15th, 1921, as attorney in the Office of the Alien Property Custodian, and in the performance of his duties in that regard, his relation to the Custodian was the relation of attorney and client. As such he had under his supervision and attention the matters and affairs of the Atlantic Communication Company and the New York Patents Exploitation Corporation, subsidiaries of the defendant, who was the owner of their capital stock. Their properties had been and their capital stock was, seized by or under the direction of the Alien Property Custodian, an agency of the United States Government, and said properties

were sold to the United States for the use of the Navy Department.”

Court’s Finding of Fact No. 12 (cont’d) (R. 40):

“The negotiations with the Navy Department for the conveyance to it of the properties of the Company were about September, 1918. Tomlinson was the principal executive officer. The Corporation Management Division of the Bureau of Sales of the office of the Alien Property Custodian was located in Washington. It was in this Division that John Wilson Brown, III, was employed from January 20, 1919, to April 15, 1921. The Corporation Management Division was charged with the duty of having a complete set of corporate actions taken in cases where the Alien Property Custodian had seized more than 15% of the capital stock of a corporation and with the acceleration of the Custodian’s policy of selling alien interests by calling the directors’ attention to the taking of steps to get companies ready for sale. The case of the Atlantic Communication Company came to the Corporation Management Division sometime in the year 1918, but it was considered by the head of the Division, Mr. Brown’s superior, as having been placed by Mr. Palmer and Mr. Garvan in charge of Judge Delahanty, John Tomlinson and Ramsey Houget, who were not in this Division and that responsibility for looking after legal matters on behalf of the Custodian was on Judge Delahanty. There were approximately six hundred corporations in the Corporation Management Division and *each corporation was allocated within the Division to an attorney, and that of the Atlantic Communication Company was allocated to plaintiff Brown.*” (Italics ours.)

Those portions of the Court’s Findings shown above in italics are in substantially the same language em-

ployed by this Court in *Brown v. Miller, supra*. This Court, adopting the language of the court below in that case, said:

“that it should not be necessary for the court to go into a detailed question of how much a lawyer knows of the business of his client in each case.”

It would therefore seem to be unnecessary to show what Brown actually did know of Telefunken's affairs or what actions he took with respect to them while in the employ of the Custodian, but only his knowledge of the method of doing business in the Custodian's office and that while there employed he always had access to any files therein. Nevertheless this record does disclose far more of Brown's actual connection with the Company's affairs while in that office than did the record in the Miller case, *supra*.

For instance, the testimony of Brown and his stenographer, Miss Cilley (through documents in the files of the Custodian, as appears in the bill of exceptions at pages 89 to 99, 107 to 110 of the Record, in support of defendant's exception No. 2, and the testimony of Paul Smith, Chief of the Corporation Management Division, R. 122-128), showed (1) by the minutes of a meeting of the Committee on Sales on July 15, 1919, that Brown was present at said meeting; that the reference by the Corporation Management Division, in which Brown was employed, of the case of Atlantic Communication Company, one of the subsidiaries of Telefunken, to the Supervision and Liquidation Division in New York (which case had been assigned to Brown for attention as referee), was approved; that the commentaries submitted by Brown with respect thereto were ordered made a part of the minutes; and that said commentaries of Brown were to the effect

that the Atlantic Communication Company (subsidiary of Telefunken) was the owner of the wireless station at Sayville; that the Custodian held 97 per cent of the stock; that a Board of Directors had been installed by the Custodian; that it was proposed to sell the plant to the Government; and that the sale had been accomplished but dissolution was being held up. It also appears (R. 96) that on July 17, 1919, two days after this meeting of the Committee, Brown dictated the following letter to the New York Office with respect to the action taken at that meeting.

“July 17, 1919.

Re: Atlantic Communication Company
CM-8

The Alien Property Custodian,
Bureau of Sales,
Division of Supervision & Liquidation,
110 W. 42nd St.,
New York City.
Gentlemen:

We enclose herewith resolution of Washington Committee on Sales, referring above case for your disposition.

We shall be glad at any time to forward answers to any specific questions with reference to this Company as shown by our files. To forward a more lengthy synopsis of the case than that transmitted would necessitate practically a reduplication of our files, which is impracticable.

If you care to send a referee to this office to confer on these and other cases which will be shortly forwarded to you from this Division, we shall be glad to place our files and the time of our referees handling the cases at your disposal.

Very truly yours,

CORPORATION MANAGEMENT DIVISION.

By

JWB:MF”

(2) that the Atlantic Communication Company and the New York Patents Exploitation Company, two subsidiaries of Telefunken, had been assigned to Brown for review and recommendation; that the affairs of Telefunken came into the Corporation Management Division because of its ownership of the stock of these two subsidiaries; that the minutes of the directors of the Atlantic Communication Company were received by the Corporation Management Division and came under Brown's observation; that he read the minutes before ordering them filed (R. 92); that if they contained matters which he thought needed recommendation he would make such recommendations; that he dictated letters to the New York Office calling for minutes and other matters relating to the Companies' affairs so that they might be placed before the Custodian, that in correspondence with the New York Office he requested such minutes in the future be forwarded as nearly after the meeting is held as is practicable "in order that the records of the corporation may be kept as nearly up to date as possible" (R. 93); that on February 2, 1920, he wrote to the New York Office advising them that the Custodian had assigned the further supervision of the liquidation of the enemy interest in the New York Patents Exploitation Company (one of the subsidiaries of Telefunken) to the Corporation Management Division in Washington and to enable that Division to intelligently continue supervision and record the exact status of the Company they were requested to furnish the information outlined in an enclosed questionnaire; that it was necessary that an authentic statement of the assets of the Company on hand March 28, 1918, and the subsequent disposition of same be filed so that they could

account for such assets in kind or their avails; that it was essential that they should have an up-to-date knowledge of the status of the companies at all times; that their purpose was to provide a complete record in the case so that when it is concluded every step in the liquidation will be apparent and will be available in the future for inquiry and reference (R. 97); that the minutes of a stockholders' meeting of Atlantic Communication Company which were forwarded to Brown's division in Washington and "referred to Mr. Brown for consideration" showed, amongst other things, the sale of the Company's property at Sayville, Long Island, together with patents and interest therein licensed to it by Telefunken, for \$143,459.11 (R. 98); that with respect to certain letters from the New York Office to the Corporation Management Division which bore the endorsement of Mr. Raines "referred to Mr. Brown for consideration," Brown testified in explanation that Raines was not known in New York among the attorneys and for that reason was requested whenever he had trouble in getting the minutes back from New York to make out the letter for Brown's signature "to lend the weight necessary to speed up the return of the papers requested" (R. 110); that with respect to a certain letter of July 17, 1919, initialed by him, Brown testified that about that date "was the first time he had authority to sign his own name as Corporation Manager" and up to that time such letters would be prepared by him and signed by the Chief of the Division (R. 110); that all such letters bore Brown's initials.

Paul Smith, Chief of the Corporation Management Division, testified without contradiction that the Corporation Management Division in Washington looked to

the New York Office to see that the assets of the companies in the hands of the Custodian, which were to be sold, were conserved and that when a sale was made the highest bid was an adequate bid (R. 123); *that the Corporation Management Division was organized after Brown came into the office* (R. 123), and that that Division tried to accelerate the program of sale and liquidation of companies and to that end communicated with the representatives of the company in the New York Office (R. 123), and tried to find out the true value of the companies which it was proposed to sell; that the purpose of the supplemental demands for the stock of the alien companies, as in the case of the Atlantic Communication Company, was to take care of any possible flaws in the previous demand as a safeguard and it was done in every case where something was to be done with the property (R. 123); that the first thing that an attorney in the Corporation Management Division (such as Brown) would do when he had been assigned one of these companies would be to acquaint himself with the contents of the bound volumes in connection with that company and he could go further and secure the records of the Bureau of Trusts, particularly in connection with the way the demand had been prepared and served (R. 123); that the term "attorney" was synonymous in the Corporation Management Division with "referee"; that the Chief of the Division signed most of the correspondence but the attorneys sometimes signed some of it; that all those in the Corporation Management Division designated as attorneys were lawyers and Brown was responsible to the Alien Property Custodian (R. 125); that it was the duty of Brown to investigate the records in the Custodian's office and ascertain the report that

was made of the enemy stock interest and the demands that followed that report, and he was also to investigate the correspondence that passed between the office and the company, or anybody else with respect to the company and to find out generally if the stock had been properly seized and could be sold and transferred to a purchaser without any cloud on it (R. 126); that while the members of the Committee on Sales had an acquaintance with most of the matters referred to in the minutes of the meeting of July 14, 1919, they would be justified in relying upon Brown's intelligence and care in preparing his comments; that besides acting as referee in connection with the corporations that were allotted to him, Brown made frequent trips to New York to the Bureau of Sales in connection with the corporations which had been allotted to him; that most of the time when Brown was an attorney in the Corporation Management Division he and Galloway were the only attorneys and after Galloway was transferred to be Assistant Attorney General, Brown was the only attorney in the Division for a considerable time; that Brown's signature on the supplemental demands for the stock of the Atlantic Communication Company were only to identify the second page as being a part of the first; that part of the work of the Corporation Management Division was to be certain that the alien interests were properly seized and transferred to the Alien Property Custodian and that job was allocated to the attorney to whom the company was, in the majority of cases, allocated (R. 127).

And the Court found (R. 41) that the following facts were established:

Court's Finding of Fact No. 12 (cont'd):

“The allocation of this case to Mr. Brown was made because all cases were as a matter of routine allocated to someone. It was a routine of the Bureau of Trusts and the Corporation Management Division to have prepared supplemental demands in every case where property was to be sold or otherwise disposed of. When the supplemental demand was issued in respect of the stock of the Atlantic Communication Company, in September, 1919, the schedule constituting additional pages attached to the demands were identified by the signature of John Wilson Brown, III. The correspondence requesting the sending of minutes by the Atlantic Communication Company and the New York Patents Exploitation Company to the Corporation Management Division at sundry dates in 1919 and 1920 were written and signed by plaintiff, Brown, for the Corporation Management Division and in the case of replies was brought to his attention and sent by him to the files. Transmitted in such correspondence were the minutes of directors' meetings and stockholders' meetings authorizing the sale of the Sayville plant and the interest in the patents owned by the Atlantic Communication Company to the Navy Department. The entire file of the Alien Property Custodian, which eventually included these minutes, was accessible to him. On July 15, 1919, as the person to whom Atlantic Communication Company had been referred in the Corporation Management Division, he reported to the Washington Committee on Sales that Atlantic Communication Company was the owner of the wireless plant at Sayville, Long Island; that the Alien Property Custodian's holdings constituted approximately 97 per cent of the capital stock; that the full board of directors had been installed; that Judge Delahanty as Alien Property Custodian's counsel was supervising the

liquidation; that it was proposed to sell the plant to the United States Government and dissolve; that the sale had been accomplished but dissolution was being held up owing to certain liquidation involving assets of the company. The action taken by the Committee on this report was to order this comment to be made a part of the minutes of the Committee and to confirm the previous reference of the Atlantic Communication Company to the Supervision and Liquidation Division of the Bureau of Sales at New York City."

The sum of these evidentiary facts is this—that the administration of the affairs of Telefunken, and its subsidiaries, was delegated by the Custodian to those in charge of the New York Office always under the supervision and control, however, of the Custodian himself through the Corporation Management Division in Washington in which Brown was employed as an attorney to whom this case, amongst others, was specifically referred.

In the case of *Brown v. Miller, supra*, it appeared that the plaintiff after the termination of his employment in the Custodian's Office undertook to represent a claimant against the Custodian and the United States seeking to recover a large sum of money claimed to be due from the Paper Company whose affairs he had supervised while in the employ of the Custodian as attorney. The basis of his claim against the Custodian was a shortage of duty on the part of the Board of Directors of the Paper Company who had been selected by the Custodian; just as in this case he undertook by the terms of his contract of employment to enforce certain rights of Telefunken against the Alien Property Custodian because of a shortage of duty on the part of the Boards of Directors

of Atlantic Communication Company and New York Patents Exploitation Corporation, subsidiaries of Telefunken, selected by the Custodian, in selling the assets of these Companies for an inadequate consideration, and because of the seizure of such assets by the Custodian and their use by the United States.

In his declaration herein Brown specifically alleges that in the performance of his contract for services he and his associates informed themselves as to the rights, titles and interest of the defendant and the events incident to the deprivation of the defendant thereof, i.e., the seizure and sale of their assets by the Custodian; that they considered and advised upon methods of procedure (R. 5):

“including possible suits to set aside the assignment and restore title in the Alien Property Custodian, petitions in bankruptcy or insolvency to invalidate transfers made without adequate consideration, proceedings in the Court of Claims.”
(Italics ours.)

It further appears in the opinion in *Brown v. Miller*, *supra*, that upon consideration of the facts therein, which in all essential particulars were identical with the facts herein proven, the Court ordered that Brown, the appellee herein, be excluded from acting as attorney against the Custodian and that his name be stricken from the files and record thereof as such attorney or counsel.

This Court in passing upon the question said:

“Was the relation of appellant (Brown) to the Custodian such as to justify the decree below? The law is well settled that an attorney, having acted as such for a client, cannot thereafter assume a hostile position to him about the same

matter, and cannot later use against him knowledge or information obtained from his client while that relation subsisted. (Citing authorities.)

“We have already found that the appellant (Brown) was the attorney of the Custodian concerning the Paper Company’s matters, and think the facts as to his relation thereto, already appearing, bring him within the interdiction of the rule. We agree with what it is claimed, and not denied, that the learned judge below said in disposing of the case, viz:

“ * * * I do state that it should not be necessary for the court to go into a detailed question of how much a lawyer knows of the business of his client in each case. But if he has represented that client in a certain matter, I think a lawyer should not represent anyone in opposition to his client in that same matter. Now, under the conceded facts in this case, Mr. Brown had such connection with this matter that I think renders it, I will not say grossly improper, but I think very inexpedient, for him to represent the plaintiff in this case.’

“If, however, as appellant claims, it be assumed that it was incumbent upon the court to make further inquiry, and ascertain whether or not appellant was, in the Butler case, using information acquired while in the Custodian’s employ, we think the record before us sufficiently demonstrates that information thus acquired was so used. His answer to the petition shows an intimate knowledge of the methods of doing business in the Custodian’s office, and admits that while there employed he always had access to any files therein.

“The bill in the Butler suit contains various interrogatories that manifestly are based upon the knowledge or belief that certain facts existed which would be shown by papers in the Custodian’s office. Interrogatory No. 14 may be used as an illustration. It was:

“ ‘Did or did not the Custodian, succeeding to the rights of enemies, come into sole ownership or control of all the capital stock of the Paper Company?’

“Some of the documents in the Custodian’s office, which came under the attention of appellant, relate to that very matter—show that the Custodian did come into such ownership, and that appellant not only knew about it, but performed services in connection therewith. A similar condition with respect to other interrogatories, and the acts performed by the appellant in the Custodian’s office, is shown by the record.

“Appellant undertakes to explain away the inferences arising from these facts, by saying his action in such matters was mechanical and not confidential. We cannot subscribe to this view. We are inclined to think, however, that the conduct of appellant in participating as an attorney in the Butler suit was not intentionally unprofessional. It was rather inadvertently so.

“Officers of the government, employing attorneys, are entitled to the same protection against unprofessional conduct on their part as are private persons, and attorneys so employed owe the same fidelity to such employers as to other clients. We find no abuse of discretion on the part of the court below, and no error in its proceedings.

“Its judgment is therefore affirmed, with costs.”

It is respectfully submitted that the moderate and kindly language of this Court in that case that

“We are inclined to think, however, that the conduct of appellant in participating as an attorney in the Butler suit was not intentionally unprofessional. It was rather inadvertently so”

would not be justified by or applicable to the conduct of the same person, Brown, in this instance. The deci-

sion of this Court in his case with relation to this identical impropriety was dated February 5, 1923, the record in that case having been filed in this Court by Brown on May 24, 1922. From that record it appears that the petition that Brown be required to withdraw as counsel in the pending cause and that his name be stricken from the records of that suit as such counsel was filed on February 14, 1922, and that the order for his removal and that his name be so stricken was filed March 17, 1922, almost exactly three months prior to the date of Brown's contract of employment in the instant case.

The record in the instant case shows (R. 99-103, 112) that about eight months after he left the office of the Alien Property Custodian and a year after he had been urging the officers and directors of the Company in New York (appointees of the Alien Property Custodian) to furnish the Washington office with more complete data including the company's minutes showing the sale to the United States, he was conferring with representatives of Telefunken (his "prospective client") with reference to representation in connection with Telefunken's rights, its relations to the Alien Property Custodian and the United States and the possibility of establishing claims on its behalf against the Government. It also appears that during the very period from December, 1921, to June, 1922, when he was negotiating for this representation of Telefunken the propriety of his representation of the Butler Company in its case against the Alien Property Custodian and the Treasurer of the United States arose. During that period the petition for his removal as attorney was filed, heard and the order of his removal passed and his appeal therefrom filed in this Court. In spite of

this action of the Court in a case involving the identical principle which was being forcibly brought to his attention at that very time, we find him entering into another agreement to represent with respect to claims against the Alien Property Custodian and the United States another concern with which he had had identical relations while in the employ of the Alien Property Custodian. The record in the instant case also shows (R. 42, 80, 81, 82, 142) that neither at this time nor any other time thereafter did he disclose, either to Telefunken or to his associates, the Frankenthals, that he had been employed in the office of the Alien Property Custodian or had had any contact with the affairs of Telefunken while there. Indeed even at the time of the trial in this case "his memory is not stimulated or refreshed so that he remembers handling the matter at all in the Alien Property Custodian's office" (R. 115). It is unfortunate that Brown's extraordinarily poor memory has again brought him into conflict with "public policy." So that it cannot be said that in this instance his conduct was "not intentionally unprofessional" or that "it was rather inadvertently so."

The Court found in this case (Court's Finding of Fact No. 24, R. 44) that:

"Pursuant to the aforesaid contract, plaintiff and his associates, made claims against the Alien Property Custodian and the United States Government for the return of the seized property, or compensation for its actual value, upon the ground that such property had been sold by or under the direction of the Alien Property Custodian to the United States at a grossly inadequate price."

And the defendant requested the Court to find (Defendant's Requested Finding of Fact "C," R. 151) that:

“About one year after the termination of plaintiff’s employment in the office of the Alien Property Custodian, to wit, under date of June 22nd, 1922, plaintiff, together with an associate, Alfred Frankenthaler (the latter being represented and associated in the negotiations for, and in subsequent performance under, said agreement by and with his brother, George Frankenthaler), jointly entered into a written agreement with the defendant to represent the defendant as its attorneys for the purpose of recovering to the defendant the properties of the defendant and its said subsidiaries, the Atlantic Communication Company and the New York Patents Exploitation Corporation, or the true value thereof, which has been so seized and sold to the United States Government, upon the ground that such sale or sales by or under the direction of the Alien Property Custodian had been at grossly inadequate prices and without adequate or proper authority and were therefore void.”

The refusal of this request was the basis of defendant’s Exception No. 17 (R. 152), and Assignment of Error No. 17 (R. 60).

These facts were abundantly established by the undisputed testimony and other evidence set out in the bill of exceptions (R. 44, Findings of Fact Nos. 24 and 26; R. 82, 143-149). After such a showing (the admitted purpose of the agreement of employment, followed by their actions pursuant thereto) it can scarcely be argued that Brown was not taking a position adverse to his former clients, the Alien Property Custodian and the United States.

While U. S. Revised Statutes, Sec. 190, making it unlawful for any former employee in any of the Government Departments to act as counsel or attorney for the prosecution of any claim against the United States

which was pending in any Department while he was such employee, within two years after his leaving the service, has been held to apply only to employees of the regular executive departments, yet the statute is highly illustrative of the public policy here involved and upon which the statute is based. The case of *Van Metre v. Nunn* (1912), 116 Minn. 444, 133 N. W. 1012, which arose under the provisions of that statute, and which is cited in an annotation thereof in U. S. Code, annotated, Title 5, Sec. 99, is a well considered authority directly in point upon the question as to what are claims against the United States or the Alien Property Custodian under circumstances identical in principle with those here involved. In that case the facts were that:

“The plaintiff, a lawyer, who had been chief clerk of the agency at White Earth reservation, made a contract with an Indian, within one year after plaintiff had left the employ of the United States, to recover from the United States the value of certain timber cut from the Indian’s land. Pursuant to such contract the plaintiff took up the matter of the claim with the commissioner of Indian affairs, and was informed that there was no remedy for the claimant; whereupon he presented the matter to the chairman of the Senate Committee on Indian Affairs, and a member of Congress from Minnesota, which resulted in an Act of Congress authorizing the adjustment and payment of the claim by the Secretary of the Interior. Holding that he could not recover for the services rendered, the court said:

‘The plaintiff’s construction of this statute is this: “The statute was enacted for the purpose of prohibiting the persons occupying the posi-

tions therein mentioned from prosecuting by means of a lawsuit, and in any manner and by any means to aid in the prosecution of any such claim by means of a lawsuit, before a court or tribunal having jurisdiction to hear, determine, and to make a final disposition of the claim." It is obvious that this is a technical view of the statute, not justified by its language, and that it prohibits during the time limited the persons therein named from acting as counsel, attorney, or agent in the collection of any claim against the United States which was pending in any of its departments while he was such officer, clerk, or employee.' "

Under the statute in question, it was only necessary to show that such a situation existed in any of the departments with respect to the client's matters as would form the basis for a claim against the United States, in order to disqualify an employee in that, or any other department, from accepting employment to represent a client with respect to such claim within two years after the termination of his employment in the department, and this without reference to whether such former employee had had any knowledge of or contact with the client's matters while he was employed by the Government.

In this case, however, which depends upon the general public policy involved independently of the statute, it appears from the undisputed facts that the plaintiff actually had under his jurisdiction and consideration while in the department the very matters, concerning the appellant here, upon which he subsequently undertook to base its claim against the Government.

Whether, from the point of view of Brown, either

the claim presented by him and his associates, or the method of presentation, was adverse or hostile to his former employer, the Alien Property Custodian, is of little importance and has no controlling force in any proper consideration of the questions here involved. The Custodian himself considered it so adverse to the position formerly taken by his predecessor in office that he refused to be a party to any proposition to reverse that position, or to secure compensation from the Navy Department upon the theory that the sale of Telefunken's property to that department has been made upon an inadequate consideration.

The contention of Brown that his efforts on behalf of his client, Telefunken, were not hostile to his former employer, the Alien Property Custodian, because he was diplomatically attempting to secure the Custodian's cooperation in his effort to secure compensation from the United States upon the ground that the action of the Custodian's *predecessor* in effecting and sanctioning, through his agents, a sale to the United States Government at a grossly inadequate price, we submit, can scarcely be taken seriously. The fundamental basis of the claim which he was presenting was that the sale by or under the authority of the Custodian's predecessor was illegal, unconscionable and void, if indeed it was not actually fraudulent; that it was in derogation of the rights of the owners, the Atlantic Communication Company and the New York Patents Exploitation Corporation, and their creditor and stockholder, Telefunken (R. 141-149, 151). Refusal to grant a special finding of Fact No. C-7 (R. 152) based upon this letter of Brown's was the ground of Exception No. 10 and of Assignment of Error No. 19.

Public Policy Is a Matter of Law.

The question of public policy here involved is a question of law and not of fact; is broader than the mere terms of the statutory law and embraces the general purpose and spirit of such law (*Georgia Fruit Exchange v. Turnipseed*, 9 Ala. A. 123, 62 So. R. 542). It is not limited to matters which are expressly forbidden by statute for reasons of public policy, but extends to matters, although not expressly stated, which are within the reason declared by the statute (*People v. Collins*, 9 A. 622, 99 Pa. 1109).

State v. Bowman, 184 Mo. Ap. 549, 170 S. W. 700, 30 L. R. A. 193, is a well-considered case on this subject by the Supreme Court of Missouri, which reviews the numerous applicable authorities and in which the Court said:

“It is plain from a reading of the many concrete cases that transactions are held to be against public policy because against the policy of the law; that is, against the manifest object and trend of the whole law on that subject, rather than against a specific enactment prohibiting it. Many cases will be found denouncing acts or agreements as contrary to public policy when no specific statute or constitutional provision prohibits the same * * *

“These and numerous other decisions show that, in determining what is or is not against public policy, we may and should go to the common law and to the decisions of other States, as well as our own, the same as in determining any other rule of substantive law. We are also to consult the Constitution and statutes of our state *on kindred and cognate subjects.*”

It is that principle of the law which holds that no one can lawfully do that which has a tendency to be

injurious to the public or against the public good (50 C. J. 858, and authorities there cited). It is synonymous with "Policy of the law."

It is such public policy which was the basis for the decision of this Court in the case of *Brown v. Miller*, *supra*.

Brown's disqualification is also supported by the following authorities:

- Derlin v. Derlin*, 121 A. 27, 142 Md. 352;
- People v. Hanson*, 125 N. E. 268, 290 Ill. 370;
- Johnson v. Morris*, 108 S. E. 810, 27 Ga. App. 463;
- Gottam v. Nat'l Mutual Church Ins. Co.*, 209 Ill. App. 404.
- Harris v. Young*, 215 Ill. App. 489.

On April 10, 1933, this Court in deciding the case of *Case v. Hewlig, et al.*, 62 App. D. C. 98, 61 W. L. R. 340, 65 F. (2d) 186, considered the effect of Section 109 of the Criminal Code of the United States (Section 198, Title 18, U. S. C.) upon the division of compensation under a contract of employment of certain attorneys in connection with a claim against the United States, as well as its effect upon or connection with a certain attempted assignment of the interest of one of the attorneys in and to such compensation. The statute imposed a penalty upon any officer of the United States who shall act as attorney in the prosecution of any claim against the United States, or aid therein or receive any compensation therefor or share therein. The Court held that in spite of an agreement for division of a contingent fee between the attorneys employed, there could be no recovery by, or through assignment from, one of these attorneys for services performed by him prior to his acceptance of employment by the Government;

that the retention of any interest in such compensation by the attorney after such employment was contrary to the public policy as expressed in the statute and that the agreement for a division of the compensation between the original attorneys, as well as the assignment of the interest of one of them, was void (citing *Oscanyan v. Arms Co.*, 103 U. S. 261). Quoting from *Ex parte Curtis*, 106 U. S. 371, 373, the Court say:

“The evident purpose of Congress *in all this class of enactments* has been to promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service.” (Italics ours.)

The inescapable fact is, therefore, that Brown was disqualified from acting as attorney for Telefunken in claims against the Alien Property Custodian or the United States as matter of public policy and that his employment contract was void. See also *Asher v. Beckner*, 19 Kentucky Law Rep. 521; *Gaulden v. The State of Georgia*, 11 Ga. 47; *Nichols v. Riley*, 118 App. Div. (N. Y.) 404; *Downard v. Hadley*, 116 Ind. 131, and *Thomas v. Turner*, 87 Va. 1.

Absence of Objection to Contract by Alien Property Custodian.

The Trial Court held that the defendant (Telefunken) could not raise the question of public policy because the Custodian had not objected to such employment and the learned court shut his eyes to the obvious fact that the employment contract was void as against public policy.

The fact that Brown's connection with the affairs of Telefunken while in the Alien Property Custodian

Office was known to the Alien Property Custodian's successor to whom Brown presented Telefunken's claim, if it was a fact (of which there is no evidence whatever) and that the Custodian did not object to his employment, should not be taken into consideration in determining the validity of the agreement as affected by public policy. If the Custodian had such knowledge and failed to exercise the Government's right to object, that could not affect the question of the public policy involved. His silence cannot be interpreted as a waiver by the Government of objection to such employment for he could not have waived the Government's rights or affirmatively consented to such employment had he wished to do so. *Hunter v. U. S.*, 5 Pet. 173, 8 L. Ed. 86. See also *U. S. v. Willamette Valley etc. Co.*, 54 Fed. 807; *Utah Power & Light Co. v. U. S.*, 243 U. S. 398; *Utah v. U. S.*, 284 U. S. 543; *U. S. v. Carbon County Land Co.*, 46 Fed. (2) 980; *U. S. v. Crary*, 1 Fed. Supp. 406; *U. S. v. Chemical Foundation*, 272 U. S. 1.

It is but fair to say that this ruling of the Court below was prior to the decision of this Court in the case of *Noonan v. Gilbert*, 63 App. D. C. —, 62 W. L. R. 86, 68 Fed. (2) 775, in which this Court said:

“* * * But a court in the due administration of justice is bound to refuse its aid to enforce a contract that offends public policy. The invalidity of the contract may not be waived ‘by any system of pleading, or even by the express stipulation of the parties.’ The question ‘was one which the court itself was bound to raise in the interest of the due administration of justice.’ *Oscanyan v. Arms Co.*, 103 U. S. 261, 267, 26 L. Ed. 539; *Steele v. Drummond*, 275 U. S. 199, 204, 48 S. Ct. 53, 72 L. Ed. 238.”

In *Burke (Trist) v. Child*, 21 Wall. 441, 88 U. S. 441, 22 L. Ed. 623, the Supreme Court of the United States held that the illegality of a contract because it was against public policy may be availed of as a defense even by those who have profited by it or may profit by it. And in *Steel v. Drummond*, 275 U. S. 199, 204, 72 L. ed. 238, the United States Supreme Court said:

“It is only because of the dominant public interest that one, who has had the benefit of the performance by the other party, is permitted to void his own obligation on the plea that the agreement is illegal.”

In Re Boone, 83 Fed. 944, is one of the cases approvingly cited by this Court in *Brown v. Miller*. In the Boone case the Court said:

“An attorney cannot use the knowledge acquired confidentially from his client in trafficking with his client’s interests. *Hatch v. Fogerty*, 40 How. Prac. 492. This general and well-settled rule is not found in any positive enactment. Indeed, none is necessary; it springs from the very nature and necessities of the relation of attorney and client, and finds its highest sanction in the confidential character of that relation. No rule in the ethics of the legal profession is better established nor more rigorously enforced than this one. The relation of attorney and client is one of mutual trust, confidence, and good will. * * * He is not allowed to divulge information and secrets imparted to him by his client or acquired during their professional relation, except, perhaps, in very rare circumstances, or when authorized to do so by the client himself. * * * The relation may terminate, but the obligation nevertheless continues. * * * This brief statement of the duties

and obligations which an attorney owes to his client demonstrates of itself, if, indeed, any demonstration is necessary, how utterly inconsistent with the proper and faithful discharge of them, and, in fact, totally subversive of them, would be any rule permitting the attorney to occupy a position hostile to his client, or to use against him the knowledge he has confidentially acquired.

* * * * *

“There is certainly nothing in this stipulation, nor in the release, taken as a whole, which states explicitly that Mr. Bowers consented that Mr. Boone should take employment in the suit of Bowers against Bates, nor, in fact, in any case in which Mr. Bowers had appeared as plaintiff, which involved the validity of the patents for which Mr. Boone, in other cases, while acting as his attorney, had litigated; * * * And that part of the stipulation which ‘consents that said Boone may engage his services pro or con, as he may see fit.’ is not inconsistent, in the absence of any more definite stipulation, with the idea that it was intended to apply to employments entirely outside of and foreign to Bowers’ patents with reference to which Boone had rendered professional services to Bowers. * * *

“* * * In brief, it would seem as if the petitioner had consented that the respondent, as attorney, might violate with impunity any of the obligations which the law imposes upon the relation of attorney and client. * * * *But, aside from that, a client cannot consent that an attorney should be released from obligations which the law imposes upon him. * * * In determining that the present contract of release is void, I am guided by reasons of public policy, and by considerations which relate to the due and orderly administration of justice, to the honor and purity of the profession, to the protection of clients, and to the dignity of the court itself. * * ** It is absolutely inconsis-

ent with the duties, burdens, and obligations which an attorney assumes when he enters into the relation of attorney and client, and, in fact, is subversive of them. * * * *The fact that a client may be willing to enter into such a contract does not justify the court in upholding it, nor can the client's consent or connivance shelter an attorney from unprofessional conduct. Courts owe a duty to themselves, to the public, and to the profession which the temerity or improvidence of clients cannot supersede.*

* * * * *

“* * * The fact that the case in which the respondent proffered his services was not one of the cases in which he had been employed by, and had rendered service to, the petitioner, can make no material difference in the application of the rule. The case of Bowers against Bates involved the same patents at issue in Bowers against von Schmidt and Bowers against the San Francisco Bridge Company, in both of which cases the respondent had represented the petitioner.” (Italics ours.)

Illegality of Agreement Available as a Defense.

The contract being void as against public policy, this fact may be availed of as a defense even by those who have profited by it, or may profit by it. This was held in *Burke v. Child*, *supra*, in which the Supreme Court of the United States said:

“In our jurisprudence a contract may be illegal and void because it is * * * inconsistent with sound policy and good morals * * *.”

It is a rule of common law of universal application, that where a contract express or implied is tainted with either of the vices last named, as to the consideration or the thing to be done, *no alleged right founded upon it can be enforced in a court of justice.*” (Italics ours.)

In that case plaintiff's decedent, Trist, had a claim against the United States, which he had employed one Child to prosecute by lobby services for a contingent fee. Trist's executor defended on the ground that the contract was void and unenforceable as against public policy and the Supreme Court of the United States on appeal so held, although Trist's executor, the defendant below, had profited by it. To the same effect see:

Johnson v. Morris, 27 Ga. App. 463, 108 S. E. 810;

Gottam v. Natl. Mutual Church Ins. Co., 209 Ill. App. 404;

Harris v. Young, 215 Ill. App. 489;

Boyd v. Second Judicial District Court, 274 Pac. 7;

Harvey v. Harvey, 231 N. W. 580 (Wis.) (this case also holds that both attorneys and court are under duty to raise point of attorney's unprofessional conduct in bringing action against former client involving use of confidential relations):

Wingilia v. Ashmann, 217 N. W. 909, 241 Mich. 543;

Baker v. Farnsworth, 221 N. W. 17;

Hovel v. Minn. etc. Rwy. Co., 206 N. W. 710, 164 Minn. 449.

In *Steele v. Drummond*, 275 U. S. 203, 72 L. Ed. 239, Mr. Justice Butler, speaking for the Supreme Court, said:

“It is only because of the dominant public interest that one, who has had the benefit of performance by the other party, is permitted to avoid his own obligation on the plea that the agreement is illegal.”

In *Marshall v. B. & O. R. Co.*, 16 How. 314, 14 L. Ed. 953, the Supreme Court said:

“It is an undoubted principle of the common law, that it will not lend its aid to enforce a contract
* * * which is inconsistent with sound morals or public policy.”

This language was quoted by Mr. Justice Butler in *Steele v. Drummond*, *supra*.

Illegality Need Not Even Be Pleaded.

Oscanyan v. Winchester Repeating Arms Co., 103 U. S. 261, 26 L. Ed. 539, holds that the illegality of the contract in suit can be considered although not affirmatively pleaded. The case reviews *Marshall v. B. & O. R. Co.*, and *Burke v. Child*. See also the very recent case of *Sage v. Oil Country, etc. Co.*, 27 Pac. (2d) 543 (Kan.), 62 W. L. R. 1017 (Dec. 28, 1934).

Assignment of Interests.

In the recent case of *Case v. Helwig*, *supra*, this Court also held that inasmuch as Helwig was not entitled to a fee for such services as he had performed prior to his employment by the Government, one Calhoun, who claimed through him, could not recover, and also that the assignment from Helwig to his brother was void because it contemplated a privity of interest between them with respect to the contingent fee earned jointly by Helwig and his partner, Case.

II.

Any Agreement Between Brown and Telefunken for Employment to Secure Legislation for a Contingent Interest in the Recovery to Be Obtained Thereby Was Void as Against Public Policy.

In view of the unequivocal position with respect to this matter taken by the Supreme Court of the United States and by this Court over a long period of years in the many cases consistently holding that such agreements are void as against public policy, culminating in the recent case of *Noonan v. Gilbert, supra*, decided by this Court on January 2, 1934, no discussion of the authorities on this point is necessary. In the *Noonan* case this Court said:

“Plaintiff (defendant in error) brought suit in the court below claiming a balance due on a contract for professional services. The amended declaration alleges that plaintiff was retained as counsel by the defendant (plaintiff in error) ‘to appear before the Public Utilities Commission and any Congressional committees holding hearings as to merger or fare increase by the street railways of the District of Columbia. * * * and was by argument and the production of data and evidence before the Public Utilities Commission, and, if necessary, before Congressional committees, to endeavor to bring about such a reduction of fares by order of the Public Utilities Commission, and if not, by Congressional enactment. * * * It was understood and agreed that only lawful means should be used, and that plaintiff’s work before the Public Utilities Commission, and Congressional committees, should consist only in making arguments, furnishing data to, and producing evidence before, said Public Utilities Commission, or Congressional committee. Defendant was to pay all

the necessary expenses of plaintiff incident to said work and was to pay plaintiff as fee for his services the sum of \$500.00 in any event, and the sum of \$1,000.00 if said reduction of fares was brought about.'

"To this declaration defendant filed a demurrer alleging that the contract was void as against public policy. The demurrer was overruled and trial had, which resulted in a verdict and judgment for the plaintiff.

"A contract for services to be rendered by an agent or attorney before a legislative body in securing the passage of a measure is lawful if it does not contemplate the use of improper means. Where the compensation for procuring legislation is contingent, the contract is *void as against public policy, regardless of whether corrupt practices are resorted to or contemplated*. *Marshall v. Baltimore and Ohio Railroad Co.*, 16 How. 314, 336; *Tool Co. v. Norris*, 2 Wall. 45; *Trist v. Child*, 21 Wall. 441, 452, 22 L. ed. 623; *Hazleton v. Sheckells*, 202 U. S. 71, 79, 26 S. Ct. 567, 50 L. ed. 939, 6 Ann. Cas. 217, 6 R. C. L. 735, sec. 140, 13 C. J. 432, sec. 368.

"In the *Norris* case the court said: 'Agreements for compensation contingent upon success, suggest the use of sinister and corrupt means for the accomplishment of the end desired. The law meets the suggestion of evil, and strikes down the contract from its inception.' 2 Wall. at p. 55, 17 L. ed. 868. The court further observed that 'the decisions have not turned upon the question, whether improper influences were contemplated or used, but upon the corrupting tendency of the agreement.'

"It was held in the *Sheckells* case that the contract involved a contingent fee for services which, when rendered, were legitimate. The court said (202 U. S. at p. 79, 26 S. Ct. 567, 568, 50 L. ed. 939, 6 Ann. Cas. 217): 'We assume that they (the

services) were legitimate, but *the validity of the contract depends on the nature of the original offer*, and, whatever their form, the tendency of such offers is the same. The objection to them rests in their tendency, not in what was done in the particular case.'

"That the contract in the present case was contingent in part is clear. While plaintiff was to receive \$500 in any event, the payment of the additional \$500 was contingent upon success. 'Every part of the consideration goes equally to the whole promise, and therefore, if any part of it is contrary to public policy, the whole promise falls.' Hazelton v. Sheckells, 202 U. S. 71, 78, 26 S. Ct. 567, 50 L. ed. 939, 6 Ann. Cas. 217, 'That which is bad destroys that which is good, and they perish together.' Trist v. Child, 21 Wall. 441, 452, 22 L. ed. 623.

"Defendant reserved no exception to the action of the court in overruling his demurrer to the amended declaration, and, while he moved for a directed verdict at the close of plaintiff's evidence, he failed to renew the motion at the close of all the evidence. But a court in the due administration of justice is bound to refuse its aid to enforce a contract that offends public policy. The invalidity of the contract may not be waived 'by any system of pleading, or even by the express stipulation of the parties.' The question 'was one which the court itself was bound to raise in the interest of the due administration of justice.' Oscanyan v. Repeating Arms Co., 103 U. S. 261, 267, 26 L. ed. 539; Steele v. Drummond, 275 U. S. 199, 204, 48 S. Ct. 53, 72 L. ed. 238.

"Judgment reversed, with costs, and the cause remanded, with directions to enter judgment on the pleadings in accordance with this opinion.

"Reversed and remanded." (Italics ours.)

The contract in the Noonan case showed affirmatively on its face that while the procurement of legislation

was contemplated, only legitimate means were to be used. The contract in this case, however, did not show *on its face* that the procurement of legislation was contemplated but was silent as to the means to be employed, and, therefore, the *question was not raised by demurrer* as in the Noonan case.

But the identical question is as squarely before this Court on this record as if it had been raised by demurrer, for the reason that it was conceded by the plaintiff below, and found as a fact by the Court, that the contract of employment included within the scope of the services to be performed the securing of remedial legislation. The Court found that (Court's Finding of Fact No. 25, R. 44):

“The contract of employment of June 22, 1922, was drafted by the plaintiff and the language was made by him sufficiently comprehensive to include within the scope of the services to be performed by him and his associate the securing of remedial legislation.”

And the Court also found that (Court's Finding of Fact No. 26, R. 44):

“Such services as were performed by the plaintiff and his associates were all pursuant to and comprehended within the provisions of the written contract of employment of June 22, 1922, and there was no employment of the plaintiff or any of his associates, Alfred Frankenthaler, George Frankenthaler, or Alfred K. Nippert, independently of said written agreement.”

And the Court also found that (Court's Finding of Fact No. 27, R. 44):

“The written contract contemplated and included such services as might thereafter become

necessary or advisable in securing remedial legislation in consideration of a contingent reward out of and interest in any recovery by the defendant resulting from such services.”

This record is therefore as clear with respect to what was contemplated as to the character of the services to be rendered as though they were expressly written into the agreement.

On this phase of the case no further facts are necessary or important, for since the contract contemplated the procuring of legislation for a contingent reward it was “void as against public policy, regardless of whether corrupt practices are resorted to or contemplated.”

In *Marshall v. B. & O. R. Co.*, 16 How. 314, 14 L. ed. 953, the Supreme Court of the United States said:

“It is an undoubted principle of the common law, that it will not lend its aid to enforce a contract to do an act that is illegal; or which is inconsistent with sound morals or public policy; or which tends to corrupt or contaminate, by improper influence, the integrity of our social or political institutions. * * * Legislators should act from high considerations of public duty. Public policy and sound morality do therefore imperatively require that courts should put the stamp of their disapprobation on every act, and pronounce void every contract the ultimate *or probable tendency* of which would be to sully the purity or mislead the judgments of those to whom the high trust of legislation is confided.

“All persons whose interests may in any way be affected by any public or private act of the Legislature, have an undoubted right to urge their claims and arguments, either in person or by counsel professing to act for them, before legislative

committees, as well as in courts of justice. But where persons act as counsel or agents, or in any representative capacity, it is due to those before whom they plead or solicit, that they should honestly appear in their true characters, so that their arguments and representations, open and candidly made, may receive their just weight and consideration. A hired advocate or agent, assuming to act in a different character, is practicing deceit on the Legislature. Advice or information flowing from the unbiased judgment of disinterested persons, will naturally be received with more confidence and less scrupulously examined than where the recommendations are known to be the result of pecuniary interest, *or the arguments prompted and pressed by hope of a large contingent reward and the agent 'stimulated to active partisanship by the strong lure of high profit.'*

* * * * *

“* * * Bribes, in the shape of *high contingent compensation*, must necessarily lead to the use of improper means and the exercise of undue influence. Their necessary consequence is the demoralization of the agent who covenants for them; he is soon brought to believe that any means which will produce so beneficial a result to himself are ‘proper means;’ and that a share of these profits may have the same effect of quickening the perceptions and warming the zeal of influential or ‘careless’ members in favor of his bill. * * *

* * * * *

“If severity of legislation be any evidence of the practice of the offenses prohibited, it must be the duty of courts to take a firm stand, and discountenance, as against the policy of the law, and and every contract which may tend to introduce the offenses prohibited.

“Nor are these principles now advanced for the first time. Whenever similar cases have been

brought to the notice of courts they have received the same decision.

“Without examining them particularly, we would refer to the cases of *Fuller v. Dame*, 18 Pick. 470; *Hatzfield v. Gulden*, 7 Watts, 152; *Clipping v. Hepbaugh*, 5 W & S 315; *Wood v. McCan*, 6 Dana 366; and *Hunt v. Test*, 8 Ala. 719; *The Commonwealth v. Callaghan*, 2 V Cas. 460.

“The sum of these cases is, 1st. That *all contracts for a contingent compensation for obtaining legislation, or to use personal or any secret or sinister influence on legislators, is void by the policy of the law.*” (Italics ours.)

It has been argued (although the Court below did not base its decision upon any such ground) that the cancellation clause and the fact of cancellation thereunder took this case out of the rule expressed by the Court in all other cases involving attempts to secure legislation for a contingent fee. It was assumed, and we must assume that it will be so asserted again, that that portion of the contract which called for a contingent fee became inoperative upon its cancellation and that inasmuch as Brown was suing upon a *quantum meruit* under the provisions of the cancellation clause and was not seeking to have the contingent feature of the contract enforced, he was not subject to the inhibitory rule. This argument is manifestly specious because the fact was, as found by the Trial Court (Finding No. 26, R. 44), that all of the services and activities of the plaintiff below and his associates were performed in contemplation of the agreement before its cancellation; so that the motives of Brown and his associates and the temptations to which they were subjected, as expressed by the Supreme Court in the many cases cited on this subject, were precisely the same as

though the cancellation clause had not existed and the ethical principles upon which the cases in the Supreme Court and in this court rest are in no way affected by this fact.

In *Hazelton v. Sheckels*, 202 U. S. 71, 79, 50 L ed. 941, the Court said:

“ * * But the services contemplated as a partial consideration of the promise to convey were services in procuring legislation upon a matter of public interest, in respect of which neither of the parties had any claim against the United States. An agreement upon such a consideration was held bad in Providence Tool Co. v. Norris, 2 Wall. 45, 17 L ed. 868. Of course, we are not speaking of the prosecution of a lawful claim.*

“It will be noticed further that the conveyance was in substance a contingent fee. The plaintiff was not bound to accept it and naturally would not do so unless he could agree, as he did with the government, for a larger price. The real inducement offered to him was that he would receive all that he could persuade the government to pay above the sum named. It is true that if we take the inartificial statements of the bill literally, the part of the consideration which we are discussing was the services, not a promise to render them. The promise to convey did not become binding until the services were rendered, and, when rendered, according to the allegations of the bill, they were legitimate. We assume that they were legitimate, but the validity of the contract depends on the nature of the original offer, and, whatever their form, the tendency of such offers is the same. The objection to them rests in their tendency, not in what was done in the particular case. Therefore a court will not be governed by the technical argument that when the offer became binding, it was

cut down to what was done, and was harmless. *The court will not inquire what was done. If that should be improper, it probably would be hidden, and would not appear. In its inception, the offer, however intended, necessarily invited and tended to induce improper solicitations, and it intensified the inducement by the contingency of the reward.* Marshall v. Baltimore & O. R. Co., 16 How. 314, 335, 356, 14 L. ed. 953, 962, 963.

“The general principle was laid down broadly in Providence Tool Co. v. Norris, 2 Wall. 45, 17, L ed. 868, 870, *that an agreement for compensation to procure a contract from the government to furnish it supplies could not be enforced, irrespective of the question whether improper means were contemplated or used for procuring it.* McMullen v. Hoffman, 174 U. S. 639, 648, 43 L ed. 1117, 1121, 19 Sup. Ct. Rep. 839. And it was said that there is no real difference in principle between agreements to procure favors from legislative bodies, and agreements to procure favors in the shape of contracts from the heads of departments. 2 Wall. 55, 17 L ed. 870. In Marshall v. Baltimore & O. R. Co., 16 How. 314, 336, 14 L ed. 953, 962, *it was said that all contracts for a contingent compensation for obtaining legislation were void*, citing among other cases, Clippinger v. Hepbaugh, 5 Watts & S. 315, 40 Am. Dec. 519, and Wood v. McCann, 6 Dana 366. See also Mills v. Mills, 40 N. Y. 543, 100 Am. Dec. 535. There are other objections which would have to be answered before the bill could be sustained, but that which we have stated goes to the root of the contract and is enough to dispose of the case under the decisions heretofore made.

“Decree affirmed.” (Italics ours.)

In *Hazelton v. Sheckels*, the Supreme Court held that the validity of the whole contract depended on the na-

ture of the original offer and laid down the broad principle that a contract for a contingent compensation to procure legislation for the payment by the Government for property acquired by the Government from an individual was illegal and void as against public policy independently of whether the means employed in securing such legislation were legitimate or illegitimate—the Court assuming that they were legitimate. The Court adopted the language of previous cases that “there is no real difference in principle between agreements to procure favors from legislative bodies, and agreements to procure favors in the shape of contracts from the heads of departments. In *Marshall v. Baltimore & O. R. Co.*, it was said that all contracts for a contingent compensation for obtaining legislation were void.

Certainly there can be no distinction in principle between selling to the Government a piece of real estate as in *Hazelton v. Sheckels*, or supplying the Government with supplies as in *Providence Tool Co. v. Norris* on the one hand, and on the other hand securing from the Government payment for a radio station and patents taken by the Government without adequate consideration. In the one case the effort is to secure a sale to the Government at a stipulated price and on the other, to secure from the Government an adequate price for a sale already made.

And the same Court said in *Crocker v. U. S.*, 240 U. S. 74, 60 L. Ed. 533:

“* * * Dealing with such an agreement this court said in *Providence Tool Co. v. Norris*, 2 Wall. 45, 54, 17 L. Ed. 871: ‘* * * *Agreements for compensation contingent upon success* suggest the use of sinister and corrupt means for the accom-

plishment of the end desired. The law meets the suggestion of evil, and *strikes down the contract from its inception. There is no real difference in principle between agreements to procure favors from legislative bodies, and agreements to procure favors in the shape of contracts from the heads of departments. The introduction of improper elements to control the action of both is the direct and inevitable result of all such arrangements.* Further recognition of this rule is found in *Marshall v. Baltimore & O. R. Co.*, 16 How. 314, 334, 335, 14 L. Ed. 955, 961, 962; *Trist v. Child* (*Burke v. Child*), 21 Wall 441, 22 L. Ed. 623; *Meguire v. Corwine*, 101 U. S. 108, 25 L. Ed. 899; *Oscanyan v. Winchester Repeating Arms Co.*, 103 U. S. 261, 273, 26 L. Ed. 539, 544; *Sage v. Hampe*, 235 U. S. 99, 105, 59 L. Ed. 147, 150, 35 Supp. Ct. Rep. 94." (Italics ours.)

See also: *Clippinger v. Hepbaugh*, 5 Watts & S. (Pa.) 315; *Harris v. Roof's Executors*, 10 Barb. 489 (Sup. Ct. N. Y.); *Rose v. Truax*, 21 Barb. 361 (Sup. Ct. N. Y.); *Fuller v. Dane*, 18 Pick. 472; *Globe Works v. U. S.*, 45 Court of Claims 497, 503.

It may also be pertinent in this connection to refer to the fact that appellee's counsel, over the objection of appellant, inserted in the bill of exceptions certain excerpts from the testimony (R. 211) tending to prove the alleged services of appellee and his associates upon a contingent basis. And it can be fairly argued that the Court took such evidence into consideration in fixing the amount of Brown's fee upon a contingent basis when he said in his Memorandum Opinion (R. 53):

"I have taken into consideration the amount of the ultimate recovery, both because in my opinion that should be considered in establishing the value of plaintiff's services and also as evidence of the amount in controversy."

This question of the invalidity of agreements for professional services in the procurement of Congressional legislation, which involve personal solicitation of members of Congress, *or contingent compensation*, was fully considered by Mr. Justice Adkins of the Supreme Court of the District of Columbia in the case of *Stanfield v. Vollbehr*, In Equity No. 51884, where recovery was denied on the authority of the cases hereinbefore cited. This honorable Court in affirming the decree in these respects in *Stanfield v. Vollbehr*, 60 Fed. (2) 670, 61 App. D. C. 239, said:

“We have been at much pains to examine carefully the statement of facts found by the trial judge, as a result of which we are fully satisfied that his findings *and conclusions in relation thereto*, are in all respects correct, and, in that view, it would serve no useful purpose to pursue that subject further.” (Italics ours.)

The learned counsel for the defendant in the case of *Stanfield v. Vollbehr*, *supra*, who are now counsel for the appellee herein, in their brief in that case said:

“In considering the authorities on this point, a sharp distinction is to be drawn between contracts for contingent compensation for the prosecuting of claims against the Government, as for example *debts or contract claims* which may require legislation and appropriation for their recognition and payment, on the one hand, and similar contracts for the procuring of legislation authorizing a contract or granting other advantage or benefit to which the other party to the compensation has *no existing legal claim*, on the other hand. The former class of contracts have been upheld; *the latter class are by the controlling federal rule laid down in the instant class of cases held void as against public policy.*” (Italics ours.)

And they cite *Hazelton v. Sheckels*, *Marshall v. B. & O. R. Co.*, *Crocker v. U. S.* and other cases cited herein.

If there is such a valid distinction from the point of view of public policy between contingent compensation for the prosecution of debt or contract claims against the Government which may require legislation and appropriation on the one hand, and the procuring of legislation granting benefits where there is no existing legal claim against the Government, on the other hand, then it would seem clear that the character of the legislation involved in the case at bar would fall within the latter class, since there was no existing legal claim prior to the legislation and the legislation was expressly for the purpose of creating rights so that claims for compensation could be instituted (Finding No. 6, R. 154; Finding No. 32, R. 157). Certainly it cannot be said that in the passage of the Settlement of War Claims Act of 1928 Congress was acting in a quasi judicial capacity. Counsel in the Vollbehr brief quote from the late Mr. Darlington as follows:

“A contract not to prosecute before Congress, acting in a quasi judicial capacity, *a claim of right, but to seek to obtain from it, in its purely legislative capacity, and for a contingent compensation, a contract of purchase or other advantage or benefit to which the other party to the contract has no legal claim*, is against public policy and void.

“Of the many instances in which this court and other courts have sustained agreements for contingent fees for services before Congress and before departments, the cases, without exception, *involved contracts for the prosecution of claims for the collection of debts. They are, without exception, cases for the prosecution of legal causes of action, tried before courts wherever there are courts possessing the jurisdiction to try them, and before*

Congress and the departments where, because of the absence of such jurisdiction in the courts, those bodies were appealed to in a quasi judicial capacity, *not to make laws, but to pass upon the merits of money demands*, and to award execution or provide for their payment to the extent that they were found just and legal.” (Italics ours.)

If that argument was apposite in the circumstances to which it was addressed it is certainly strongly in support of the position of the appellant here.

As indicating, however, how shadowy this distinction really is, let us look at the cases in the Supreme Court involving this question. In the *Hazelton case*, the legislation was for the purpose of effecting a sale to the Government. In *Burke (Trist) v. Child* on the other hand the legislation sought was to compensate Trist for services to the United States touching the treaty of Guadaloupe Hidalgo. Here the claim submitted to Congress was apparently upon an implied contract to pay reasonable compensation for services to the United States. In other words, it was in the nature of a debt of the Government to Trist. This case would clearly fall within the first class where as *Marshall v. B. & O. R. Co.*, which was a case where the legislation was sought for a right of way through the State of Virginia, would clearly fall within the second class. The case of *Providence Tool Co. v. Norris*, where the claim was for the procurement of a contract for the purchase of muskets, was also clearly within the second class, as was the transaction in *Crocker v. U. S.*

The analogy between the case at bar and the facts in these various Supreme Court cases is perhaps strongest in the case of *Burke (Trist) v. Child*, for there it was claimed that there was a moral obligation upon the United States to pay Trist for his services, al-

though he had no right which he could enforce in the courts or otherwise; just as with respect to the German claims involved in the Settlement of War Claims Act of 1928 there was a moral obligation upon the United States to compensate the Germans for property which had been confiscated, although they had no rights which they could enforce in the courts or otherwise.

It is admitted that neither Telefunken nor its subsidiaries had any lawful claim against the United States and Brown and his associates did not undertake to prosecute any lawful claim against the United States. They were undertaking to secure from Congress a favor or the recognition of what they considered to be a *moral* obligation of the United States as distinguished from a lawful claim, just exactly as the attorneys in the case of *Burke (Trist) v. Child* were seeking to have the United States recognize a moral obligation to allow compensation to Trist for his services to the United States touching the Treaty of Guadalupe Hidalgo.

It is of extreme importance to note that in each one of the cases in the Supreme Court of the United States in which this principle was directly applied (*Marshall v. B. & O. R. Co.*; *Trist v. Child*; *Providence Tool Co. v. Norris*; *McMullen v. Hoffman* and *Hazelton v. Sheckels*) the attorney was suing to recover under a contract with his principal for compensation. And in *Owens v. Wilkinson*, *Stanfield v. Vollbehr* and *Noonan v. Gilbert* in the Court of Appeals of the District of Columbia the same was true. Indeed, in the *Owens* case, 20 App. D. C. 54, the attorney was employed to recover on what they considered to be a lawful claim against the Government. He

“examined the claim with a view to a reversal of the findings by the accounting officers of the Treasury Department, and also with a view to the institution of suit in the Court of Claims; but he abandoned both projects, and concluded that the best, if not the only remedy was an appeal to Congress to define the status of these officers. Accordingly, he employed the firm of Shelley, Butler & Martin, composed of men experienced in that line, to help him to procure the desired legislation; and he agreed to give them one-third of whatever amount he received. After consultation with them it was concluded that it was then too late in the session of Congress to procure a special act for the purpose; and it was resolved that an attempt should be made to effect the result by an amendment to the naval appropriation bill, then apparently pending before a committee of the Senate. Wilkinson prepared an amendment which was in the following terms:

‘Provided, further, that such surgeons in the Navy not in line of promotion as may have been appointed to that position in accordance with a special act of Congress for meritorious service during yellow-fever epidemics, shall have all the benefits of their previous service in the same manner as if said appointments were re-entry into the Navy.’

“What he did thereafter according to the record, was to prepare a brief in the case and to have interviews concerning it with several Senators and Representatives, to each one of whom he states that he handed a copy of his brief. What the firm of Shelley, Butler & Martin did does not appear, and the appellee professes that he does not know, but, to use his own language, he ‘got them because they knew their business.’ The proposed amendment, at all events was offered by a Senator on the floor of the Senate, and was accepted by the committee having charge of the naval appropriation

bill. But whether this was effected immediately through the efforts of the appellee by the means of the Senators to whom he spoke on the subject, or was the result of the personal solicitation of Mrs. Owens, the wife of Dr. Owens, addressed to another Senator, the testimony leaves in some doubt. The bill, with the amendment, was passed by the Senate, and went back to the House of Representatives for concurrence. It went to a conference committee; and the appellee had interviews with several members of the House and wrote a letter to one of them, with the view of having them use their personal influence with the committee of conference for the retention of the amendment. The amendment was retained, and became a law."

There is a peculiarly striking similarity between this Owens case and the Telefunken case. One count of the declaration alleged a special contract "on or about the 16th day of March, 1896," which was not stated to have been in writing but which was identical in terms with a written contract which was put in evidence. There was also a claim for *quantum meruit* under the common counts. An instruction was asked that

"If the jury believed from the evidence that the contract between Wilkinson and Dr. Owens was for the prosecution of the latter's claim by the former upon a contingent fee of one-half of the amount that should be recovered, the verdict should be for the defendant, unless the services rendered or to be rendered were of a legitimate and proper character, and were not of the kind known as lobbying services."

This instruction was refused. There was a verdict and judgment for the plaintiff for the amount claimed and the defendant appealed.

The contract between Dr. Owens and Wilkinson was in the form of a power of attorney; is quoted in full in the opinion and briefly was as follows (p. 54):

“to present and prosecute to allowance before Congress or any and all tribunals before which the same may rightfully come, my claim against the United States for longevity pay accruing to me since my appointment as a surgeon in the United States Navy under Act of October 1, 1890, hereby assigning and conveying to my said attorney as a contingent fee for services rendered and to be rendered an interest in said claim equal to one-half of the total amount received at the date of the settlement of said claim.”

The Court in its opinion said:

“Nor is it apparent why, if the written contract is void under the statute, the oral agreement of the same precise tenor and effect can be valid. The statute does not render such contracts invalid because they are in writing, but on account of their nature and character; and an oral agreement to do what is forbidden by the law is equally obnoxious as a written contract.”

The Court discusses certain prior Supreme Court cases, including *Staunton v. Embrey*, 93 U. S. 548, and *Taylor v. Bemiss*, 110 U. S. 42, holding that contracts upon a contingent fee basis for prosecuting claims against the Government before courts and commissions involving purely professional services only were not invalid. It also points out that several of these cases involved the attempt to recover back through equity proceedings such payments as had already been made and then the court said:

“But an executory contract invalidated by law stands upon a very different basis, when a court of common law is called upon directly to enforce it in the face of the prohibition of the statute,”

and we might add “or of public policy.”

It is well established, therefore, that any employment of Brown and his associates to recover compensation for Telfunken through remedial legislation for a contingent fee, whether such employment was by express written agreement or otherwise, was against public policy, and any agreement for such employment was void, and no recovery can be had as compensation for services performed in connection with such employment.

III.

There Can Be No Recovery by Brown and his Associates for Services in Obtaining Legislation Which Included “Lobbying” Activities Which in this Record it Appears They Engaged In.

In view of the conclusiveness of the illegality of the agreement, regardless of what was done under it, it would seem unnecessary to consider the question now presented. But the Court below differed with this point of view and held that “the contract between the parties was not *on its face* a ‘lobbying’ contract for influence to be used upon Members of Congress but for services which were legitimate and was not void as against public policy”. The Court shut its eyes not only to the fact that the contract concededly contemplated the securing of legislation for a contingent reward, but also to the character of the services which were actually performed pursuant to the agreement

which the record clearly shows were of a "lobbying" nature. We therefore feel justified in reviewing certain portions of the record which disclose the pertinent facts.

The Court found as a fact (Finding of Fact No. 28, R. 44) that:

"Pursuant to and in furtherance of said agreement, plaintiff and his associates sought and endeavored to secure the passage by Congress of such remedial legislation, during the course of which endeavors plaintiff and his law partner, Alfred K. Nippert, appeared and made arguments before a Committee of the House of Representatives. Plaintiff and his associates negotiated for and secured the co-operation of persons representing other interests seeking relief through the same proposed legislation. They also attempted to defeat and claimed credit for defeating, proposed legislation which was designed to afford partial relief to Telefunken, and to other German and American clients of theirs."

In the Court's Findings of Fact beginning with No. 7 (R. 31), the Court below undertook to summarize the history of the activities of Brown and his associates in their efforts to secure the legislation in question in connection with which he found (Finding of Fact, No. 38, R. 46) that:

"Plaintiff and his associates later entered into an arrangement with Mr. Houston's firm to support the large insurance claims for war risk insurance losses represented by said Houston's firm in return for said Houston and his firm supporting the claims represented by plaintiff, with an implied threat that plaintiff and his associates would oppose the insurance claims in case said Houston should not support the claims represented by

plaintiff. Nippert and Brown threatened to Houston to defeat the Settlement of Claims Bill if their claims were not included.' '

And also that (Finding of Fact No. 7, cont'd, R. 35) :

"In the course of this and further legislative efforts, Judge Nippert was most active and was at all times an influential factor, valuable to Telefunken."

And also that (Finding of Fact No. 46, R. 48) :

"Plaintiff's associate Nippert, actively opposed said Bill (a bill affording partial relief which was not satisfactory to Brown and his associates) and said Nippert approached Speaker Longworth of the House of Representatives, with whom he was acquainted from boyhood and Chairman Green and argued against the bill and argued that said bill be not reported out of the Committee, and at the request of Houston, Lacques and Bigham telephoned the Speaker and asked him if possible to withhold its reporting out until a letter was sent him, and wrote a long letter to Speaker Longworth opposing it. Said bill was never reported out and never came to vote in Congress."

And also that (Finding of Fact No. 47, R. 49) :

"At the time the plaintiff and his associates actively opposed such bill they represented a large number of other German and American claims, including German alien property claims amounting to between two or three million dollars, fifteen or twenty of them as large as \$100,000 apiece, which, including that of the Transatlantic Trust Company, would have been adversely affected by said bill because of the amount of such claims."

And the Court also found that (Finding of Fact No. 7, cont'd, R. 36) :

“He (Nippert) had access to and the confidence of Speaker Longworth of the House, Senator Borah, Chairman of the Committee on Foreign Relations, and other legislators. He openly and explicitly revealed to them his representation of Telefunken and of other German claimants and his advocacy was by way of arguments addressed to their reason. He and plaintiff and their associates were of opinion, which opinion was proved correct by the result, that the interests of all of their clients, that is, those who had similar claims for return of property held by the Alien Property Custodian, as well as Telefunken, would best be served by advocating no bill which did not provide a comprehensive plan for the settlement of both classes of claims and the ship claims, as well as the American claims, for the reason that any bill which did less was not within the purview of the accord which had been reached between the several classes of claimants and could not command sufficient support to be enacted. Consistently with this view, he effectively opposed, through Speaker Longworth, any report to or consideration by the House of Representatives of the first Green Bill, House Bill 12643, 69th Congress, 1st Session, which, while it purported to provide for the interest of Telefunken did not provide for the return of German property generally nor for all American claims.”

In this connection the witness Nippert on direct examination testified that (R. 168) under date of April 26, 1926, he received from Honorable Nicholas Longworth, Speaker of the House of Representatives, the following letter (Plaintiff's Exhibit No. 132):

“My dear Judge Nippert:

“I telegraphed you several days ago that the Mills Bill was still under consideration in the Ways and Means Committee.

"Since your call here a situation has developed which I am afraid may prevent the passage of the bill. Doubtless you have seen the speech made by Mr. Garner, of Texas, in the House a few days ago, but in case you have not a copy I am sending it to you. The measure has not been reported as yet and I can only say to you now that I am in favor of the principle of the bill, but that I am afraid it will not pass the House.

Yours very truly,

NICHOLAS LONGWORTH."

That at that time the witness was in Cincinnati and that when he left Washington the situation of the Mills Bill was then very precarious. It looked like the bill would never be submitted to a vote; that the provisions of the bill were viciously attacked by Mr. Garner, at that time Representative from Texas and a member of the Ways and Means Committee, on the ground that the author of the bill, Mr. Mills, had a personal interest in the payment of the awards, being a stockholder of the Mergenthaler Company which had received an award at the Mixed Claims Commission; that Mr. Mills did not know he was such stockholder and immediately caused his name to be withdrawn from the bill; that Mr. Garner said that the passage of that bill was the greatest steal ever committed against the United States Treasury and an attempt to pay out of the American Treasury the awards against Germany instead of having Germany pay them themselves; that the attack which centered upon the bond issue feature of the bill was what killed it; that under date of May 13, 1926, the witness sent from Cincinnati to his associate, John Wilson Brown in Baltimore, Maryland, the following telegram (Plaintiff's Exhibit No. 133, R. 169):

“Lacques called from Ellis office asking support new bill stating prospects bright for passage providing opposition of Longworth and Begg of Ohio is overcome. Wants me to get touch with necessary factors and thinks new bill can be put over stop Told him I had not been in touch with situation for ten days and felt pessimistic from private advices but he should get in touch with you Friday morning. See him if possible tomorrow and keep me posted.”

That his relations with Lacques and Houston through this period were very close and very intimate; they represented the American War Claimants' Committee in Washington in reference to affairs connected with the bill and seemed to be their spokesmen; that this telegram referred to a new bill introduced by Representative Newton of Missouri; that under date of May 14, 1926, witness received a telegram from Speaker Longworth in Washington addressed to witness in Cincinnati, as follows (R. 170) :

“No possibility of action upon alien property legislation during this Session definitely decided that Ways and Means Committee will not report think chances next Session much more favorable.”

That Mr. Longworth knew of witness' interest in the matter and he knew who witness represented in the matter. That under date of May 18, 1926, witness received a letter from Speaker Longworth in Washington addressed to the witness in Cincinnati as follows (Plaintiff's Exhibit No. 135, R. 170) :

“My dear Judge Nippert :

“I have just read your letter of the 15th.

“You have hit the nail on the head when you intimate that the sudden and violent opposition that

arose against the Mills Bill was due not so much to the provisions of the bill itself as to the manner in which it was presented to our Committee. The truth of it all was that during this Congress the Democrats have been hunting for some issue, and Jack Garner, one of the most astute of their leaders, seized upon that clause of the Mills bill which provided for the payment at once of all the American claims, amounting to some \$200,000,000. out of the Treasury, pointing out that the very great majority of these claims were in favor of large corporations such as the Standard Oil, the Aluminum Company of America and others. Furthermore, he found that in the Mergenthaler Company one of the claimants Ogden Mills was a director and held a substantial amount of stock, and he forced Ogden to withdraw his support of the bill.

“That of course gave it an additional black eye.

“About that time I had a poll made of the House which I believe was pretty accurate, and found that if the bill was called up it would be opposed by the solid Democratic side plus a large number of Republicans, and that it would be beaten certainly by at least two to one. The argument that the Treasury officials had said that they could not afford to pay the charges following the passage of pension bills and the like, and yet could afford to pay some \$200,000,000, at once to some of the richest corporations of the country, whether well founded or not, was mighty hard to combat.

“In addition to the ten Democratic members who were opposed to reporting the bill from the Ways and Means Committee there were at least five members on the Republican side who were opposed to the report, so that if pressed with Mills not voting, the vote would have been nine for a report and fifteen against.

“Since that time another bill has been drafted known as the Newton bill, which does not involve

an immediate charge on the Treasury. It provides that the American claims be paid by the issue of non-interest-bearing certificates. If this plan had been originally proposed the situation might have been different, but it can not change the present situation, so I am advised by my friends on the Ways and Means Committee, with regard to the reporting of this bill at this session.

"I can not say positively but I have good reason to believe that much of the opposition will be withdrawn at the short session next winter, and I think there is good chance of our passing it then. This I am sure is the advisable course for those of us who are in favor of the speedy return of the alien property to pursue.

"I know that you are fully advised as to the situation and I will be glad to have you explain to our friend at home what the ramifications of this bill have been and the reasons why we must wait a short time at least to present it for passage.

Very sincerely yours,

NICHOLAS LONGWORTH."

The record (pages 171 to 179) also shows conferences and correspondence between Speaker Longworth and Judge Nippert (plaintiff's partner) with respect to various bills that had been introduced or which it was proposed to introduce in connection with this alien property legislation. And in a letter (R. 178) (Plaintiff's Exhibit No. 141) to Speaker Longworth, Judge Nippert said:

"Upon your return home, I would like to explain to you some of the questions that have arisen and that will arise in connection with the war claims settlement, with special reference to your own constituents here.

"I appreciate your letter of June 7th and should always be glad to have you keep me posted on this situation, both for local, as well as national reasons, well known to you."

And the record (p. 180) also shows that after the first Green Bill had passed the House and the Senate Committee had held open hearings for about two or three days and also executive hearings, the Senate Committee reported the bill out limiting the compensation for the radio station and patents to the sum of about \$140,000, which was about the appraisal of the Naval Board at the time of the sale; that Judge Nippert learning of this "got busy and went to see different members of the Committee and saw Senator Borah, Senator Howell and Senator Ernst"; "that Senator Howell said he had no use for the insurance people, he never did, and he had said so time and again in Committee hearings and on the floor of Congress, and would like to knock them out; that the insurance people to whom he referred were the American insurance companies (represented by Houston's firm) who got awards of about \$30,000,000 before the Mixed Claims Commission and Senator Howell was against them because they were subrogation claims; that witness told Senator Howell that there was a tribunal established by the United States Congress where these insurance people had their day in court and the Government had its day in court and witness thought this was not the time to attack the awards as granted by this tribunal"; "that witness saw Senator Borah more than once about this" (R. 181); "that the bill never came to vote and died with that Congress."

And the record further shows (R. 182) that on cross-examination the plaintiff Brown was shown a letter from himself to Dr. Kiesselbach (plaintiff's exhibit No. 102) in which plaintiff had said:

"In view of what happened last Spring they did not even stop at that, but got in touch with their

Washington associate, who devoted practically an entire day to checking up upon the possibility of any such meeting. He was able to find out nothing. Not only so, but I was able to reach a person of great influence in Washington through my own channels, and a person who had voluntarily indicated about a week before that he understood that there was something in the air between us and the American claimants, and indicated that the President, with whom he was in close touch and was going to spend the week-end, was much interested in reaching a solution of this situation and therefore could find out all the lines they were moving along."

That plaintiff was asked who the person "of great influence in Washington" was whom he approached through his own channels, to which Brown replied:

"That person was Bascom Slemph. That was the first time and last time I ever saw Mr. Slemph."

And Brown further testified (R. 182) that Mr. Slemph was doing some work for Mr. Frankenthaler at the time in Washington and plaintiff needed this information and was put in touch with Mr. Slemph in that way; that Brown at the time had no knowledge of any reason for interest on the part of Slemph in settlement of war claims legislation but was told that he could probably find out as well as anybody the real attitude of the Administration on the question in point; that he, a year or two afterward, found out that Slemph had some interest in the German shipping claims and heard that he was retained by the German shipping companies.

The record further shows (R. 183) that Brown was shown a letter from Alfred Frankenthaler to Tele-

funken dated June 29, 1926 (Plaintiff's Exhibit No. 71) and his attention called to the second paragraph of the letter which read as follows:

"We need not review the long struggle which finally terminated in the downfall of the Mellon Plan and Mills Bill, et cet. As we have above stated, we assisted the same in every possible manner in your interest. At one time when the Mills Bill was to be introduced without taking proper care of your claims, we insisted that we would use our utmost influence against the bill until your interests were protected, and on that account our associates were permitted to insert with their own hand the provisions in the Bill protecting you."

Whereupon the following occurred, the questions being by cross-examining counsel and the answers by Brown as a witness (R. 183-191):

"Q. Will you tell us to whom you insisted that you would use your utmost influence against the Bill until your claims were protected?

"A. The American claimants through Mr. Houston.

"Q. You used your utmost influence with him, did you?

"A. Yes.

"Q. Did you tell him that you would oppose the insurance claims being included within the Bill unless he would join with you in supporting the interests that you represented?

"A. I never told him so, but I meant so, and he knew what I meant.

"Q. That was fully understood between you, was it not?

"A. Always.

"Q. And was that one of the bases of your partnership arrangement, I think you termed it, between yourself and Mr. Houston?

“A. I should say that from time to time that was the most important element, but for the most part of the time we were fully in accord with each other’s aims.

“Q. Now what was the opposition in Congress to the insurance claims, and why did such opposition exist?

“A. It is a pretty broad question. In the first place, there was essential opposition to the insurance claims, particularly on the part of certain Western Senators, and particularly Mr. Howell.

“Q. I will put it to you this way: Wasn’t part, at any rate, of the opposition based on the proposition that the insurance companies had received premiums for taking the risk, and that therefore they should not be reimbursed for the losses which they had paid on those risks?

“A. I wrote a brief against the claims of the insurance companies for possible use some years ago, but I have entirely forgotten the basis of that brief and the theory of it. It was never used and I have forgotten the whole question.

“Q. Was that not really one of the principal grounds of the objection, that the insurance companies collected premiums, therefore they ought not charge losses against the German Government?

“A. I believe that was the principal objection urged on it. I do not recollect.

“Q. And were not these claims, those insurance claims, those which were subject to serious opposition?

“A. I should say every possible beneficiary in this Bill was in a very tender position throughout, and the Bill was in a tender position, and all subsequent bills.

“Q. Did you think the claims for loss of life and personal injury, for instance arising out of the Lusitania, were subject to any serious opposition in Congress?

"A. As a class, no, but they were in a very tender position as regards the actual benefits of the Bill.

"Q. But I mean was there any opposition in Congress to the allowance of such claims?

"A. Oh, not as far as I know.

"Q. Who were the associates that were permitted to insert with their own hands the provisions of the Bill protecting Telefunken?

"A. Which page is that on, please?

"Q. That is the middle of page 16 of the exhibits filed on Thursday, March 30th.

"Mr. Lesh. Please give the date of that letter.

"Mr. Betts. That is the letter of June 29, 1929.

"A. I was puzzled for a moment. I was under the impression that was my letter. The associates in question were Nippert and Brown.

By Mr. Betts:

"Q. What were the circumstances in which you inserted your own hand in the provisions of the Bill?

"A. I was shown a draft of that Bill before it was printed, in the office of Wade Ellis, by Mr. Houston, and I was asked whether the provisions of that draft were acceptable to me as far as the radio went. I made a change in it which was subsequently incorporated in the final draft, the draft I referred to was merely the first rough-draft.

"Q. No Treasury officials permitted you to insert that claim in the Bill?

"A. All contact with the Treasury officials and ourselves was by way of Messrs. Houston and Lacques, and in turn the persons through whom they might be consulted.

"Q. Then do I understand it that this clause is meant to mean that you were shown the claim in the Bill and asked if it were satisfactory, and you may have made some change in it, but you do not remember.

“A. I testified that I did make some change. What that change was I do not remember precisely.

“Q. And on the following page 17, of that letter, at the end of the second paragraph, the associates used the words, ‘We are sure that you will feel confident that we will use all our efforts and personal connections to that end’. Were the personal connections there mentioned meant to mean Mr. Houston or Mr. Lacques, or what were they meant to mean?

“A. I should say it meant Judge Nippert and myself and Mr. Lacques, Mr. Houston and Mr. Bigham, in general the group that were working toward the common end.

“Q. And then it goes on to speak at the bottom of the page, of your appearance before the Congressional Committee on April 12, 1926, and uses the following language:

‘In closing this section of our report, we would call your attention to the enclosed copy of the hearing on April 12, 1926, before the Congressional Committee in which our associate Mr. Brown, formally presented the basis of your claim to the Committee, of course, this was merely the formal presentation as both Judge Nippert and Mr. Brown and ourselves had been over the matter in great detail with numerous persons of weight and influence prior to Mr. Brown’s appearance before the Committee’.

Who were those persons, those numerous persons?

“A. I, myself, never saw any person of weight or influence in connection with this matter, because I did not know any. As I think I have testified before these letters to Telefunken from the Frankenthals were composite letters, and I really think that to answer that question you will have to ask Judge Nippert later, or Mr. Frankenthaler.

“Q. Who composed this letter before it was written and sent out by Mr. Frankenthaler?

“A. This letter was a composite production, at least between the Frankenthalers and myself, and probably Judge Nippert. That is to say I know it was a composite as far as myself and the Frankenthalers go, but Judge Nippert frequently was there to assist in these reports to Telefunken and frequently was not.

“Q. I notice that you give the credit now to Judge Nippert for a great deal of the weight and influence, but in the letter it states you had also been over the matter in great detail with numerous persons of great influence. Was that correct, that statement in your letter?

“A. If the language is to be construed that way it was just a too hasty mode of expression, because it was well known to all concerned that my acquaintances of weight and influence in Washington, or of weight and influence in Washington, were very few indeed, if any. I mean by that persons who had weight and influence with Congress.

“Q. It could not mean anything else, could it? ‘Numerous persons of weight and influence’, other than influence of persons who would pass this bill, could it?

“A. I am not attempting to in any way retract the language, but I do say that enumerating both Judge Nippert, Mr. Brown and ourselves in connection with having been over the matter in great detail with persons of great influence, it was merely a hasty expression, including all of us in one column.

“Q. Then you give Judge Nippert rather than yourself credit for going over the plan with those persons of weight and influence, do you?

“A. Certainly, as compared with myself Judge Nippert was the one this was to be attributed to, and possibly the Frankenthalers. I have merely stated that I myself did not, as you suggest, know

any persons of weight and influence in Congress.

“Q. Was your statement before the Congressional Committee intended to be a frank and fair statement of your claims?

“A. It was.

“Q. Some mention has been made of the Green Bill, which there was an attempt to kill. What Green Bill was that?

“A. An attempt to kill?

“Q. Yes, there was, as I recollect it, a Green Bill that did not become the law but was introduced shortly after the failure of the Mills Bill, and somebody suggested or requested that the Bill be killed, and I think you said,—on this I am subject to correction,—that Judge Nippert was asked to see Speaker Longworth about it.

“A. I remember that incident now, but anything I know about it is mere hearsay, and at the time of the episode testified to I was temporarily out of touch with Judge Nippert, and my only knowledge of that episode is after the fact.

* * * * *

“Q. Do you remember Mr. Houston testifying about that?

“A. Mr. Houston testified, I believe, that Dr. von Lewinski requested Judge Nippert to see Mr. Longworth for the purpose of killing the Green Bill, yes.

“Q. You were following all this legislation very closely, were you not?

“A. Yes.

* * * * *

(R. 188):

“Q. Mr. Brown, referring to the time you called to see me at my office when this litigation first arose, as I recollect it, I want to call your attention to something and ask you if this was what you told me when you were telling me about the Bill, the later Green Bill that was passed in the House,

and went to the Senate, and the Senate Committee struck out the provisions for radio and patents and changed the provision with reference to ships, and then that Bill came up in the Senate and was not reached for passage because of the campaign of Senator Vare, of Pennsylvania, who was being opposed at the time, and a filibuster which was being carried on in the Senate, and I ask you if you told me substantially as follows:

* * * * *

“Q. Mr. Brown, referring to this information you gave me about this matter in the Senate when that first Bill was going on, I will ask you if you did not state to me as follows:

‘Someone asked for the unanimous consent to the passage of the Bill. Senator Howell objected, saying he wanted to know on what terms the German shipping interests had been retained in the Bill and radio claims left out. This was done at my instance through an intermediary whose name I would rather not give. Senator Howell was also prepared with full material for a speech against the American insurance claims, and was ready to go ahead when requested to do so. It was all done through a third person. It was our ammunition to make the insurance people help us on our radio. A number of others were objecting to the unanimous consent’.

Did you tell me substantially in those words?

“A. I do not recall the conversation to which you evidently refer. I came to your office purely to discuss settlement and I did not think the notes taken of my conversation would be the basis of your questions in court. If you will put the question to me direct I think I might be able to answer it, that is without reference to what I may or may not have said then, which I do not recall.

“Q. Did you at your instance arrange the intermediary for Senator Howell to speak against the American insurance claims on certain contingencies?

“A. I made no such arrangements. I might, in such a conversation, not distinguish between hearsay and actual knowledge. There was no reason to distinguish at such a conversation.

“Q. Who was the intermediary that was mentioned?

“A. As I said I did not in conversation refer to or distinguish between knowledge and hearsay, and furthermore I do not recall the statement I made to you in that connection in that conversation. So far as I know there was no such reference or such a situation as you indicate by this, I probably never did it. Such matters were generally handled confidentially between the parties and I probably never did, if, always remembering the situation which is indicated existed there at that time.

“Q. Do you not remember telling me about an intermediary between you and Senator Howell?

“A. I did not attach much importance to the conversation I had with you, and I really don't remember much about it.

“Q. Was it not an important matter to you whether or not Senator Howell would make this speech against the insurance claims, if you did not have your claims in the Bill?

“A. That all depends on how we felt at the moment. If such a situation arose we would have to discuss the question whether that was important to us or our clients or not.

“Q. You did communicate through somebody with Senator Howell on this matter, did you not?

“A. Did I?

“Q. Who were your associates?

“A. I do not think anybody living could tell you that for this reason. At some time if you want a

messenger to go a place you may drop a hint to somebody that perhaps this situation exists, the message gets there sometimes, sometimes it does not, and if it does get there you do not know whether it is you or somebody has gotten it there.

“Q. Do you not remember now who that intermediary was?

“A. No, I do not think I ever knew.

“Q. You do not think you had any intermediary that carried the message to Senator Howell?

“A. Remember, please, that I have stated that in all my answers I am merely answering questions. The situation that you are putting in my mouth, it may be there was such a situation, very likely it is true there was such a situation. Personally I do not know whether the situation you attribute to my statement to you some years ago existed, or whether we took any action on it, or, if we did take any action on it whether that action was effective.

“Q. Do you not remember getting up ammunition to Senator Howell on these insurance claims?

“A. Absolutely no.

“Q. You knew Senator Howell was opposed to the insurance claims, did you not?

“A. Yes, I knew that.

“Q. And you intended, did you not, to use your influence against the insurance claims if the insurance claims would not support your claims, did you not?

“A. I don't know. The fact is we did not do it.

“Q. You intimated you would do it, did you not?

“A. You often intimate what you are going to do and do not do it.

“Q. Didn't you intimate that?

“A. To Houston?

“Q. Yes.

“A. Surely.

“Q. After this break between yourselves and associates and Dr. Kiesselbach, which you have

mentioned, do you remember whether you cautioned Mr. Houston that contact between you and your associates and his firm had better remain without Kiesselbach's knowledge in the future?

"A. You are now asking me a question at the present time, or as to whether I ever made such a statement?

"Q. I will ask you first the fact.

"A. Yes, for a very good reason.

"Q. And did you not tell me that at that interview?

"A. I don't remember."

The record also shows (R. 193) that in a letter from Brown's associate Frankenthaler to Telefunken reporting upon the status of the proposed legislation he said:

"in fact we have already convinced important and influential persons that your claims (being based on seizure of property on land) are superior in status to those of the ship companies. * * * It would be most unfortunate, if being without advice, we should try to oppose the bill until your interests were properly included and then find out that you had wished the bill to pass as it was because you were benefited by a collateral agreement.

"We will not hesitate to take all proper means to oppose passage of the same until your compensation is included should that be to your best interest."

And the Court found as a fact (Finding of Fact No. 66) (R. 53, 194):

"The services rendered by Judge Nippert were substantially *all* in connection with the furthering or obtaining of legislation."

The record also shows (R. 199) that Oscar R. Houston, representing certain other interests seeking relief through this same legislation testified that during one time there was hardly a week went by that witness did not see them (meaning Nippert and Brown) and have something to do with them; they and witness were co-operating, working together to bring about the thing they had discussed at their first meeting, namely, to arrive at some solution which would be approved by the American War Claimants Association, by the German Alien Property Custodian interests and by the German ships, radio and patent interests, and would at the same time be endorsed by the Administration and be acceptable to Congress. Witness had then arrived at this understanding with Messrs. Nippert and Brown that witness and they were going to continue to negotiate with each other, they endeavoring to bring the German interests and witness endeavoring to bring the American interests to a point where they could agree on a solution.

The record also shows (R. 203) that Mr. Houston conferred with his own associates and decided that the situation giving priority to the ships as against the radio station and patents was dangerous and that Mr. Houston then went to see Mr. Winston, Assistant Secretary of the Treasury and told him that the giving of priority to the ships was bitterly opposed by Nippert and Brown who represented Telefunken and that in his opinion their opposition was sufficient to defeat the bill and that he thought the Administration was jeopardizing the bill by putting in such a priority because of the opposition of Nippert and Brown; that as a result of this conference Mr. Winston agreed to take it out and it never appeared in any of the bills that were

introduced in that Congress; that Houston was fighting Judge Nippert's battles for two reasons; one, that he thought Nippert's opposition to the bill would be very dangerous and might spoil the whole thing and interfere with Houston's claims and the other was that Judge Nippert was one of the most active men who was working to get an agreed compromise bill through and in order to do that he would help the Americans when they were under attack, and his co-operation was therefore specially valuable because Houston knew that if any serious attack developed against his side of the picture he could count on Nippert to help him out; (R. 204) that Houston hoped that the plan given out by the Treasury in its press release in December, 1925, would go through but that it probably would not because it put the entire ultimate liability upon the Treasury of the United States and it did not meet with any general approval except as to the interested parties. Houston continued in touch with Nippert and Brown through the legislative history of the several bills in Congress: when the split came between Dr. Kiesselbach and Nippert and Brown, Houston's group found themselves facing two discordant groups of German interests and felt it necessary to get Nippert and Brown as well as Kiesselbach to agree on whatever was worked out, and in order to secure Nippert and Brown's co-operation he agreed with them that he would keep them informed of all that he knew of what was going on, that he would co-operate in resisting any attacks that might be made on their client, and in return for that, they would continue to co-operate in supporting whatever plan was ultimately agreed on; that they went on that system and agreed that until their interests diverged and one of them told the other that

he was no longer carrying on, that they would work together for the accomplishment of a harmonious plan that met with everybody's approval; that there was never any break in that agreement and they went on to the end until the bill went through in March, 1928; that Houston's contacts with them continued close and he saw a great deal of them; that there were other bills introduced during 1926 without the approval of the interested parties, introduced by independent members of Congress either in their own interest or at the request of individual interests; (R. 206) *that it became desirable for both Houston and Judge Nippert to oppose some bills, especially one very dangerous bill at the end of the Session in 1926; that Mr. Sidley, Chairman, and two or three other members of the American War Claimants Executive Committee, including Houston, came to Washington and saw Mr. Green, Chairman of the Ways and Means Committee, and got a very unfavorable reception, and he told them that despite what they said he intended to push the bill through until it passed if he could; Houston communicated with Judge Nippert, who was in Cincinnati, by telephone or telegraph and asked him to come back and help oppose the bill, and he came and Houston told him of their lack of success with Mr. Green and asked him if he could get Speaker Longworth to persuade Mr. Green to let the bill die in committee, and he said he thought he could and would make an effort. Nippert told Houston afterward that he had seen Mr. Longworth and that Mr. Longworth had agreed to act, and in fact the bill was never heard of after that, there was no hearing on it, it was never reported and no action was taken on it (R. 207). Mr. Sidley did not know of Judge Nippert's interposition in that matter; Houston*

was not acting independently of the Chairman of his Committee and anything that concerned the accomplishment of obtaining a bill that was satisfactory Houston reported to Sidley and Sidley knew Houston was making every effort he could to defeat this bill and Houston doubted if he told Sidley everybody that he asked to oppose the bill and did not feel it was his duty to tell Sidley just who was fighting their battle; Sidley knew Houston was in touch with Nippert and Brown. At the time Nippert reported to Houston he told Houston what would happen in the Fall,—that the Ways and Means Committee would get a special authorization from the House to meet in advance of the regular legislative session in the Fall of 1926 in order to hold hearings and act upon alien property; that was the first information Houston got as to what was going to be done; Nippert told Houston he had been so advised by Speaker Longworth (R. 207). Houston, or one of his partners, talked with the members of the Senate Finance Committee in aid of Telefunken claims and along the line that it was not fair to take ex parte appraisal by Major McMullen; that Telefunken was entitled to its day in court (R. 209); Judge Nippert told Houston that he was taking steps himself to protect Telefunken's rights and that it would jeopardize the bill if they were not taken care of and Senator Smoot offered some amendments which provided for the wireless station and patents. (R. 209) And Houston testified (R. 217) that Senator Howell was interested in favor of the radio people that Senator Howell was opposed to the insurance companies' claims; that Senator Howell had been opposed to the insurance companies for a great many years in his own home state, and quite consistently in the Senate; that Hous-

ton knew of his opposition and knew he would be an opponent before he, Houston, had ever heard of Nippert and Brown; that Nippert and Brown were quite ready and quite active to help the bill, no matter who was attacked. If the insurance companies were attacked Nippert and Brown were ready to do what they could to help the insurance companies. When the attack was on the International Harvester Nippert told Houston he was giving them some help; that he was ready to help the Americans if they were attacked, and in return for that it is quite true that Houston did what he could to help Telefunken claims and the German claims as well. There were a certain number of people who were apt to appear before the committee and attack various interests. They (Nippert & Brown) would find out what a man's attitude was in advance. We (Houston) were able sometimes to convert him before he put his attack in black and white; that there were conversations with various members of these two committees in which Houston could very effectively point out that the German ships and wireless, etc., should in justice be left in the bill. (R. 219) Nippert and Brown's opposition would be sufficient to kill the bill. He, Houston, could not be very specific about what their opposition would consist of but knew that the Siemens & Halske Company was an important institution that had presumably a good deal of influence both in this Country and in Germany and it was Houston's judgment that the determined opposition of able counsel for a company of that standing was a dangerous thing to any bill that was as delicate as this was; that Nippert and Brown never told Houston what they were going to do to defeat the bill and Houston did not know but was very much afraid of it; that they had

threatened to do it rather diplomatically if their client was not included in the bill.

The record also shows (R. 229) that Alfred Frankenthaler, one of the associates of Brown, in a letter to Telefunken under date of June 30, 1925, had said:

“Messrs. Nippert & Brown, our Washington associates, and ourselves are keeping in very close touch with all proposals and plans for the return of German property. We are in such position that it is quite impossible for any measure of this kind to go to vote in Congress without such suggestions as we shall make in the protection of your interests being given careful consideration in connection with any proposed bill and its hearing in committee. You can count upon us to exert every effort personally and through Messrs. Nippert & Brown to make the Government see the propriety and justice of awarding you monetary compensation for the value of your patent property, as well as our general efforts to secure the release of actual funds held by the Custodian.”

It further appears from the record (R. 243) that the relations of Nippert & Brown to Houston and his firm remained cordial and close during the legislative history; it was founded on good faith and mutual confidence that they would act as though they were associates until the time came when one or the other of them saw their interests were separate; that their agreement was such that it would have been an absolute breach of faith for anyone connected with Mr. Houston's firm to have introduced or aided or abetted anyone in a compromise bill which did not provide compensation for radio station and patents satisfactory to Nippert and Brown.

It also appears from the record (R. 244) that Brown did not appear before any Congressional Committee other than the one hearing on the Mills Bill and that while his partner Nippert appeared before that Committee he did not mention anything about the radio claims but had a great deal to say about depreciated currency; that it was Brown's view that it was better for him to avoid meeting additional people just because they were interested in these same problems for fear of some complication or disclosure of confidence in this matter where his partner Nippert had already established a firm connection with the people they thought could do the most for them.

Nippert testified (R. 260) that while he had known Mr. Longworth since he was a boy he did not approach him to defeat the first Green Bill and it is not fair to say that he used his efforts with Mr. Longworth to prevent the first Green Bill being reported out of the Committee; that he used arguments before Mr. Longworth setting forth the danger of the Green Bill and that the Green Bill had no chance of passing and was a dangerous bill; that in referring in his letter to Mr. Longworth of June 9, 1926, to Mr. Longworth's constituents he referred to the fact that in Cincinnati a large percentage of the population were of German descent whose relatives had claims against the Alien Property Custodian.

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It will doubtless be contended by counsel for the appellee as they did below, that such services as were undertaken or performed by Brown and his associates do not come under the classification of lobbying services which are held to be against public policy. In *Burke (Trist) v. Child*, 21 Wall. 441, 22 L. ed. 623, the

court in classifying services which could be legitimately contracted for in the furtherance of legislation, said:

“Within this category are included drafting the petition to set forth the claim, attending to the taking of testimony, collecting the facts, preparing arguments, and submitting them orally or in writing, to a committee or other proper authority, and other services of like character.”

and within the condemned category:

“An agreement—to pay for supporting for election a candidate for sheriff (*Swayze v. Hull*, 3 Halst. 54); to pay for resigning a public position to make room for another (*Eddy v. Capron*, 4 R. I. 395; *Parsons v. Thompson*, 1 H. Bl. 322); to pay for not bidding at a sheriff’s sale of real property (*Jones v. Caswell*, 3 Johns. Cas. 29); to pay for not bidding for articles to be sold by the government at auction (*Doolin v. Ward*, 6 Johns 194); to pay for not bidding for a contract to carry the mail on a specified route (*Gulic v. Ward*, 5 Halst. 87); to pay a person for his aid and influence in procuring an office, and for not being a candidate himself (*Gray v. Hook*, 4 N. Y. 499); to pay for procuring a contract from the government (*Tool Co. v. Norris*, 2 Wall. 45, 69 U. S. XVII, 868); to pay for procuring signatures to a petition to the Government for a pardon (*Hatzfield v. Gulden*, 7 Watts. 152); to sell land to a particular person when the surrogate’s order to sell should have been obtained (*Bridgewater v. Brookfield*, 3 Cow. 299); to pay for suppressing evidence and compounding a felony (*Collins v. Blantern*, 2 Wils. 247); to convey and assign a part of what should come from an ancestor by descent, devise or distribution (*Boynton v. Hubbard*, 7 Mass. 112); to pay for promoting a marriage (*Scribblehill v.*

Brett, 4 Bro. P. C. 144; *Arundel v. Trevillian*, 1 Ch. 87); to influence the disposition of property by will in a particular way. (*Debenham v. Ox*, 1 Ves. 276; see also *Add. Cont.* 91, 1 Story, Eq. ch. 7; *Collins v. Blantern*, 1 Sm. L. Cas. 676, Am.n.”

As shown by those portions of the record heretofore cited it is admitted, and indeed it is affirmatively claimed as one of the bases for compensation, that the legislation desired in the interest of Telefunken was greatly furthered, if not indeed procured, through a “gentleman’s agreement” between Brown and his associates on the one hand representing the interests of Telefunken and other German claimants and on the other hand, Houston and his associates representing the American claimants, which interests had been divergent; that only by getting such divergent interests together and hand in hand working for legislation which would benefit both could anything be accomplished; that independently of the merits of their respective claims and interests nothing could be accomplished as long as they were acting at cross purposes; that they succeeded in securing an agreement with the representatives of the American claimants that each would support and neither would oppose legislation for the other’s benefit—a typical log-rolling agreement characteristic of the commonest forms of lobbying. Do such means and methods of forwarding legislation anywhere fit into the category of purely professional services as defined by the Supreme Court of the United States in *Burke v. Child*? On the contrary such methods were clearly within the spirit of several of the instances included by the Supreme Court in its condemned category, such for instance as an agreement not to bid at a sheriff’s sale.

The true character of such negotiations and agreements between adversely interested parties seeking this legislation and its wide differentiation from the legitimate and professional services approved by the Supreme Court is brought into strong relief by the secret and confidential character of the negotiations between the representatives of these respective parties as testified to,—particularly by Brown and his associates. The confidential character of such negotiations appeared to be of the utmost importance from Brown's point of view.

In view of this testimony, to say that there is no evidence in this case of lobbying activities on the part of Brown and his associates is merely to shut one's eyes to the obvious.

It must be conceded that the only services in connection with the passage of the legislation performed by Brown and his associates which could possibly be construed as coming within the category sanctioned by the Supreme Court in *Burke v. Child*, was the preparation of the briefs and presentation of arguments on one occasion each by Brown and Judge Nippert before the Committee of the Ways and Means of the House, which briefs and arguments are reproduced in the official printed records of that hearing. Their whole case is predicated upon the supposed value of their activities in furthering this legislation—that is, activities other than the formal preparation and presentation of public arguments before the Committees. It is predicated upon the supposed value of just such services as have been characterized as lobbying services in every one of the adjudicated cases bearing upon this subject. They were the bringing together of conflicting interests for harmonious action; allaying

all opposition; personal and individual solicitation of members of Congress and those having influence with such members for their interest and assistance in such measures and tactics as would forward the legislation in which Brown and his associate had a personal and contingent interest.

But for the very reason that such lobbying activities are usually performed under cover and indirectly and are difficult, if not impossible of proof, the principle has been laid down by the Supreme Court of the United States and followed by this Court that

“agreements for compensation contingent upon success suggest the use of sinister and corrupt means for the accomplishment of the end desired. The law meets the suggestion of evil and strikes down the contract from its inception.”

This was quoted with approval in *Crocker v. U. S.*, 240 U. S. 75, 60 L. ed. 535, from *Providence Tool Co. v. Norris*, 2 Wall. 45, 17 L. ed. 868, 870, 871; also by this Court in *Owens v. Wilkinson*, *supra*.

And *Hazelton v. Sheckels*, *supra* was decided by the Supreme Court of the United States upon precisely this principle, for they say:

“It will be noticed further that the conveyance was in substance a contingent fee. * * * The promise to convey did not become binding until the services were rendered, and, when rendered, according to the allegations of the bill, they were legitimate. *We assume that they were legitimate*, but the validity of the contract depends on the nature of the original offer, and, whatever their form, the tendency of such offers is the same. The objection to them *rests in their tendency*, not in what was done in the particular case. * * * The court will not inquire what was done. *If that should be*

improper it probably would be hidden and would not appear. In its inception, the offer, however intended, necessarily invited and tended to induce improper solicitation and it intensified the inducement by the contingency of the reward." Citing *Marshall v. B. & O. R. Co.*; *Providence Tool Co. v. Norris*, as well as *McMullen v. Hoffman*, *supra*. (Italics ours.)

And in *Burke (Trist) v. Child*, *supra*, the Supreme Court of the United States said:

"Was the contract a valid one? It was, on the part of Child, to procure by lobby service, if possible, the passage of a bill providing for the payment of the claim. * * * In our jurisprudence a contract may be illegal and void because it is contrary to a constitution or statute, or *inconsistent with sound policy and good morals*. Lord Mansfield said: 'Many contracts which are not against morality, are still void as being against the maxims of sound policy', *Jones v. Randall*, 1 Cowp. 39.

"It is a rule of the common law of universal application, that where a contract express or implied is tainted with either of the vices last named, as to the consideration *or the thing to be done*, no alleged right founded upon it can be enforced in a court of justice.

"The question now before us has been decided in four American cases. They were all ably considered, and in all of them the contract was held to be against public policy, and void. *Clippinger v. Hepbaugh*, 5 Watts & S. 315; *Harris v. Roof*, 10 Barb. 489; *Rose v. Truax*, 21 Barb. 361; *Marshall v. R. R. Co.*, 16 How. 314. We entertain no doubt that in such cases, as under all other circumstances, an agreement express or implied for purely professional services is valid. Within this category are included: drafting the

petition to set forth the claim, attending to the taking of testimony, collecting facts, preparing arguments and submitting them orally or in writing, to a committee or other proper authority, and other services of like character. All these things are intended to reach only the reason of those sought to be influenced. They rest on the same principle of ethics as professional services rendered in a court of justice, and are no more exceptionable. But such services are separated by a broad line of demarcation from *personal solicitation*, and the *other means* and appliances which the correspondence shows were resorted to in this case. *There is no reason to believe that they involved anything corrupt or different from what is usually practiced by all paid lobbyists in the prosecution of their business.*

* * * * *

“The agreement in the present case was for the sale of influence and exertion of the lobbying agent to bring about the passage of a law for the payment of a private claim, without reference to its merits, by means of which, if not corrupt were illegitimate and, considered in connection with the pecuniary interest of the agent at stake, contrary to the plainest principles of public policy. No one has a right, in such circumstances, to put himself in a position of temptation to do what is regarded as so pernicious in its character. *The law forbids the inchoate step, and puts the seal of its reprobation upon the undertaking.*

* * * * *

“We are aware of no case in English, or American jurisprudence like the one here under consideration, where the agreement has not been adjudged to be illegal and void. We have said that for professional services in this connection, a just compensation may be recovered. *But where they are blended and confused with those which are for-*

bidden, the whole is a unit and indivisible. That which is bad destroys that which is good, and they perish together. Services of the latter character, gratuitously rendered, are not unlawful. The absence of motive to wrong is the foundation of the sanction. The tendency to mischief, if not wanting, is greatly lessened. The taint lies in the stipulation for pay. Where that exists, it affects fatally, in all its parts, the entire body of the contract.

* * * * *

“The elder agent in this case is represented to have been a lawyer of ability and high character. The appellee is said to be equally worthy. This can make no difference as to the legal principles we have considered, nor in their application to the case in hand. The law is no respecter of persons.” (Italics ours.)

The most favorable thing that can be said about the activities of the parties representing the various interests, as shown by this record is that they were “log-rolling”; that independently of the merits of each others interests, they were in a compact which might be expressed by “you help me and I’ll help you”; and that they used such approaches to influential members of Congress and other officials as they severally had for their common good. If this is not the essence of “lobbying” what is “lobbying”?

It is clear therefore that Brown and his associates engaged in “lobbying” activities and it is well settled that where such activities appear there can be no recovery for services performed in securing legislation.

In *Owens v. Wilkinson*, 20 App. D. C. 51, this Court said (p. 68):

“But it does not follow from this that there may not be a right to recover under the common counts for a quantum meruit, if the services rendered by the appellee or stipulated to be rendered by him were such as the law would approve and were not against public policy. It is argued on behalf of the appellant that they were in contravention of public policy, and therefore that no recovery can lawfully be had for them. And this is the second question in the case. But we apprehend that, under repeated decisions of the Supreme Court of the United States, this question also must be resolved against the contention of the appellee.

“It appears very plainly from the record that the services contemplated to be rendered and which were in fact rendered consisted mainly in the procurement of legislation by the Congress of the United States and in personal solicitation of members of Congress for that purpose. *That, for the accomplishment of this purpose, there were no improper or unlawful means used or intended to be used, may well be conceded*; and that some of the means used, such as the preparation of a brief to be laid before some of the committees of Congress or handed to individual members of that body, were eminently praiseworthy and such as a lawyer might very properly render for the benefit of his client, may also be conceded. *But that there was personal solicitation used in the procurement of the desired legislation, is very evident.* Now this is what the Supreme Court of the United States has condemned. *McMullen v. Hoffman*, 174 U. S. 639; *Trist v. Child*, 21 Wall. 441; *Tool Co. v. Norris*, 2 Wall. 45; *Marshall v. B. & O. R. Co.*, 16 How. 314.” (Italics ours)

With respect to what was done by the attorneys in the case of *Owens v. Wilkinson*, *supra*, the Court said (p. 72):

“As we understand it, the rule to be deduced from the decisions of the Supreme Court of the United States which have been cited, is this—that agreements for professional services in the procurement of Congressional legislation, which involve personal solicitation of members of Congress, will not be enforced by the courts, whether improper means are used or not in such solicitation. Here there was undoubtedly personal solicitation of several members of Congress. It is not charged that any improper means were sought to be used to control their action, and in all probability none such were used; but the personal solicitation was of the kind that has been reprobated by the Supreme Court as tending to lead all concerned in it to the temptation to disregard the public interest for the sake of private emolument. It may be remarked that in most cases it would be difficult, if not impossible, to prove the use of improper means to influence the action of those who are thus approached; and that for this reason also, as well as to remove the occasion of temptation, the courts refuse to lend their aid where there is any personal solicitation whatever, whether in itself legitimate or illegitimate.

“In view of this doctrine laid down by the Supreme Court of the United States, we must hold that there can be no recovery by the appellee for his services in the premises. And while, as already stated, some of those services were undoubtedly legitimate and not obnoxious to any rule of public policy, such as the preparation of a brief, yet inas much as the contract was one and indivisible, and it is impossible to distinguish what was allowed by law from that which was disallowed, there can be no recovery for any part of the services. What was said in the case already cited of *Trist v. Child*, *supra*, is appropriate. There the court said:

‘We have said that for professional services in this connection a just compensation may be recovered. But where they are blended and confused with those which are forbidden, the whole is a unit and indivisible. That which is bad destroys that which is good, and they perish together.’ ”

In this Telefunken case the record shows personal solicitation of members of Congress and other lobbying activities quite as clearly as they were shown or indicated in the Owens case. That there was personal solicitation of members of Congress by Brown and/or his associates, and particularly by Judge Nippert, is much more substantially shown than was the case in *Owens v. Wilkinson*.

Allison v. Dodge (C. C. A. 1923) 287 Fed. 621, holds: *The personal influence of an individual with an officer of the government is not a subject for barter and sale, and a contract to pay for the exercise of such influence to induce the officer to enter into a contract is contrary to public policy and void.*

In *Noble v. Mead Morrison Mfg. Co.*, 237 Mass. 19, 21, Chief Justice Rugg said:

“It is a principle of the common law, indubitable in its soundness and inflexible in its application, that contracts will not be enforced directly or indirectly, but will be stricken down as void, which tend injuriously to affect the public welfare, or *which promote the use of personal influence or extraneous pressure upon the conduct of public officials.*”

**Services Under the Contract Cannot Be Separated Into
“Valid” and “Invalid” for the Purposes of Re-
covery.**

There can be no recovery in this action for such part of the services performed, if any, as were not contrary to public policy, since the unity of the contract for services, in consideration of a contingent interest in the result cannot be severed.

In *Trist v. Child, supra*, the Court said:

“But where they (the legitimate services) are blended and confused with those that are forbidden, the whole is a unit and indivisible. That which is bad destroys that which is good, and they perish together. * * * The taint lies in the stipulation for pay. Where that exists, it affects fatally, in all its parts, the entire body of the contract.”

And “when the express contract is void for illegality, the policy of the law will not permit recovery for part performance of it either on the contract or in implied assumpsit.” *Martin Civ. Proc. Appendix*, p. 348; 5 C. J. 1389

McMullen v. Hoffman, 174 U. S. 639, 43 L. ed. 117, holds:

1. *One of the parties cannot maintain an action on the valid part of the contract relating to the partnership, by discarding or omitting to prove that portion which is illegal.*

2. *The unity of such a contract cannot be severed or its effect altered by putting part of it in writing and leaving the rest in parol.*

3. *In any action brought in which it is necessary to prove an illegal contract in order to maintain the ac-*

tion, courts will not enforce it, nor will they enforce alleged rights directly springing from such contract.

4. The court refused to enforce such a contract, and it permits the defendant to set up its illegality, not out of any regard for the defendant who sets it up, but only on account of the public interest, etc.

In *Burke v. Wood*, 162 Fed. 533 (C. C. 1908) the trial court gave the following charge to the jury:

“If you believe from the evidence that there was no such express contract, but that the plaintiff did, at the request of the defendant, perform work and labor, and render services for him, in the effort to effect a sale of the Bienville Water Supply Company’s waterworks, and you further believe from the evidence that the work and labor so done by the plaintiff was done as a ‘lobbyist’ and the services rendered were ‘lobbying’ services, then the court charges you that the plaintiff cannot recover for the work and labor so done; and the court further charges you that if this suit is brought to recover compensation for work and labor done as a ‘lobbyist’, and for services other than ‘lobbying services’, rendered by him, and these services were blended with the services as ‘lobbyist’, the plaintiff cannot recover in this case. Pay for ‘lobby services’ or for work and labor done as a ‘lobbyist’ irrespective of an express contract therefor, is not recoverable in a court of justice.”

The court farther charged the jury in substance as follows:

“A ‘lobbyist’ is one who frequents the lobby or the precincts of a legislature or other deliberative assembly with the view of influencing its members, by personal solicitation, the exercise of personal influence, or by improper methods, whereby legis-

lative or official action is to be procured. To 'lobby' is to try to influence such members, and to solicit their votes, whether in the lobby or elsewhere. 'Lobbying services' are defined to be solicitations by persons supposed to have personal influence with the members of a legislative body to procure certain legislative action."

And in ruling upon a motion for a new trial the Court said (Tomlinson, Dist. Judge):

"In my judgment the verdict in this case is manifestly against the evidence and the charge to the court; and a more thorough examination and consideration of the evidence, tested by the law of the issue, than was afforded me during the progress of the trial, has satisfied me that the court erred in refusing to give the general affirmative charge requested by the defendant. Justice, therefore, requires that the verdict be set aside and a new trial granted. And it is so ordered."

And in *Hazelton v. Sheckels*, 202 U. S. 71, 78, 50 L. ed. 941, the Supreme Court, holding that the contract there involved was against public policy and void, said with respect to the severability of the consideration: "every part of the consideration goes equally to the whole promise, and therefore, if any part of it is contrary to public policy, the whole promise fails."

See also *Gray v. Hook* (N. Y. C. A. 449), 4 Comst. and *Filson's Trustees v. Himes*, 5 Pa. State Rep. 452.

Certain Cases Relied on by Plaintiff Below (Appellee Here).

Cases holding that the court will not lend its aid to enable a litigant to recover back compensation already

paid for services in securing legislation upon a contingent basis are not in point and are not inconsistent with the rulings laid down and consistently adhered to by the Supreme Court and those following its lead, that contracts for obtaining legislation for a contingent fee are illegal and void and therefore will not be enforced. The reason underlying the rulings in both classes of cases is the same, namely, that the court leaves the parties to such contracts where it finds them. This Court in *Owens v. Wilkinson*, *supra*, has thus distinguished the case of *Taylor v. Bemiss*, 110 U. S. 42, relied upon by counsel for the plaintiff below.

In *Wylie v. Coxe*, 15 How. 414, the services were before a commission and had nothing to do with legislation. The same is true in *Wright v. Tebbitts*, 91 U. S. 252, 23 L. ed. 320.

In *Stanton v. Embry*, 93 U. S. 548, 23 L. ed. 984, the court rested its decision upon the authority of *Wylie v. Coxe* and *Wright v. Tebbitts*, *supra*, the procuring of legislation not being involved. The court saying:

“Contracts for lobbying stand upon a very different footing as was clearly shown by the Chief Justice in commenting upon a prior decision in which the opinion was given by Mr. Justice Swayne.” (Referring to *Trist v. Child*)

Spalding v. Mason, 161 U. S. 375, 40 L. ed. 738, has no bearing upon the question here involved. No question was raised in the case as to the validity of a contract for contingent compensation for securing legislation, or otherwise, and apparently no such contract was involved as the court said (p. 743):

“The terms of the contract will not justify the construction that the rights of complainants were

dependent upon the successful passage of the bills then pending in Congress.”

Respectfully submitted,

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Washington, D. C.,
January 28, 1935.

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA.

APRIL TERM, 1934.

—
No. 6294.
—

GESELLSCHAFT FUR DRAHTLOSE TELEGRAPHIE, M.B.H.,
A Corporation, *Appellant*,

v.

JOHN WILSON BROWN, III.

—
BRIEF FOR APPELLEE.
—

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April 1, 1935.

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA.

APRIL TERM, 1934.

No. 6294.

GESELLSCHAFT FUR DRAHTLOSE TELEGRAPHIE, M.B.H.,
A Corporation, *Appellant*,

v.

JOHN WILSON BROWN, III.

BRIEF FOR APPELLEE.

**The Judgment Below and the Findings of Fact on
Which it was Based.**

This is an appeal from a judgment at law for the plaintiff below, which judgment was entered on special findings of fact made by the trial justice, which findings are the equivalent of a verdict of a jury.

The court below found that the amount for which judgment was entered was the reasonable value of services rendered by four lawyers over a period of six

years to the appellant German corporation in the protection of its interests in this country arising out of seizures of its property here in respect to which appellant recovered a final award of \$5,000,000 principal, plus interest calculated to December 31, 1928, making a total of \$6,875,342.19 (R. 39). The attorneys for whose services to the appellant the trial justice made this award were Alfred Frankenthaler (who did not participate in the rendition of service after he took office as a justice of the Supreme Court of the State of New York on January 1, 1927), George Frankenthaler, his brother and law partner, of the New York bar, Alfred K. Nippert, of the Cincinnati and Washington bars, and appellee John Wilson Brown, III, of the Washington bar, to whom the claims of the other three of these four lawyers had been assigned and by whom therefore the suit was brought. The trial justice in response to the issues made by the pleadings, after a trial lasting fifteen trial days in which 246 exhibits were introduced and testimony taken comprising a stenographic transcript of 1402 pages, besides depositions of nine witnesses taken in New York and in Germany, found as a fact that the "reasonable value of the services rendered by the plaintiff and his associates up to the time of the termination of their employment on April 20, 1928, was the sum of \$250,000." (R. 39).

There is in this appeal no pretense of any defense on the merits.

Appellant has received and benefited by the services rendered by these lawyers, and appellant itself appreciated their value as they were being rendered, as is evidenced by the fact that after it had determined in April, 1927, to discharge these lawyers, it delayed

doing so until a year later, concealing meanwhile its intention so to do, and did not discharge them until after they had completed the accomplishment which appellant wished and in respect of which it wished their continued aid (see paragraph 9, findings of fact, R. 38-39). The technical and non-meritorious defenses now interposed were not assigned as reasons for the discharge of these lawyers, and the possibility of the use of such grounds to escape liability was apparently unknown to appellant until after this suit was brought. The defenses are purely the creations of counsel for the defense. That they are not well founded upon the facts of the case as found by the trial justice is made plain because their advocacy requires counsel for the appellant to challenge the findings of fact below.

Yet there is in the record no motion for a directed verdict upon the ground of insufficiency of proof as matter of law, and no contention on this appeal that there was not evidence to support all of the findings made below. The appellant apparently, without expressly saying so, seeks to have this Court reexamine the credibility and weight of the evidence below and to make different and additional determinations of fact upon which appellant's arguments are founded.

It is usually true that a complete understanding of the facts is necessary before the Court can determine what rules of law are applicable. This is conspicuously true in the present case which involves the actions of many private citizens, public persons, negotiations international in character, and negotiations with several departments of the Government over a long period of time. In such a case as this facts which become minor, trivial, and unimportant when viewed in their proper relation to the entire picture can be magnified and

seized upon by skillful advocates and made to seem of controlling interest and importance.

Under these circumstances, it is more important to the appellee that this Court should read and consider the compressed findings of fact made by the trial justice than it is that the Court should read with the same care any but the main outlines of this brief. All of the essential facts are to be found in those findings numbered 1 to 12 (R. 26-42). There follow in the findings of fact those numbered 13 to 67, which were added at the request of the appellant and which consist largely of repetitions of certain of the findings numbered 1 to 12, and of enlargements and details as to others, which were asked by the appellant for the obvious purpose of emphasizing certain of the facts believed by appellant to be favorable to its contentions.

With such a clear though compressed statement of facts as is contained in the first twelve findings already in the record, it would only increase the amount of printed matter placed before this Court to repeat them in this brief, yet without them, what we say here may seem pointless, and what appellant has printed is misleading.

The Defenses and Grounds of Appeal.

We further respectfully refer, as though made a part of this brief, to the declaration and the pleas. The second count of the declaration (R. 7-11) contains the essential facts averred, and the amended plea (R. 14-18) states defenses.

The defenses so interposed are that the "employment and letter of employment were obtained from the defendant not on its own initiative but by the active procurement of the plaintiff and the said Alfred Frank-

enthaler and are both in fact and law null and void as against public policy" (R. 17), and that the plaintiff had been employed by the Alien Property Custodian from January 20, 1919, to April 15, 1921, during which period the United States and the Custodian "acting partly or wholly through the plaintiff and others then in or connected with the office of the said Alien Property Custodian, partially or wholly divested the defendant of its" properties which gave rise to its claims (R. 17). The other denials and defenses contained in the plea have been disproven and are now abandoned by the appellant.

Consistent with the first of the two sentences above quoted, from the plea the appellant makes its argument here to the effect that an agreement with lawyers for the prosecution of a claim which requires the presentation of that claim to the legislative branch of the Government, if the contract be for a compensation contingent upon success, is against public policy. This we deny as matter of law. The remainder of the quoted sentence, that is, that the employment was "obtained from the defendant not on its own initiative but by the active procurement of" Mr. Brown and Judge Frankenthaler, is set at rest by the finding of the court below numbered 2 (R. 27), that "the employment was brought about as between said attorneys and their client upon the initiative of the client and not by the procurement of said attorneys". What remains of this defense, appellant's proposition of law, the court below found to be unsound and we confidently contend that the court's conclusion is well founded by the decisions of this and other courts as hereinafter appears.

Appellant made below an additional similar contention, not pleaded, and renews it here. It is that as mat-

ter of fact the services rendered were "lobbying", forbidden by public policy, and that this taints the entire service and precludes recovery. The simple answer to this is that the court below found against appellant on this matter of fact, and appellant neither excepted to the facts found bearing on this point nor requested other findings of fact. Doctrines of law condemning "lobbying" are not material to an appeal wherein the trier of facts has found there was none, and the findings are not challenged by objections or exceptions. The evidence supposed by appellant to prove "lobbying" has no proper place in the bill of exceptions and was apparently brought here only to becloud the issue. Appellee has felt compelled, however, to have included in the bill some of the evidence upon which the court below made its unchallenged findings against this assertion of appellant.

The defense indicated by the second of the above quotations from the defendant's plea, that which rests upon the proposition that Mr. Brown as a person employed in the office of the Alien Property Custodian participated in the seizure of appellant's property and was therefore disabled from accepting employment by the appellant in respect of that seizure, is not well founded in fact, nor in law when the actual facts are examined. The facts, however, about this contention need to be critically examined, and were examined and found by the court below.

The Facts Show no Disabling Prior Employment of Appellee Brown by the Alien Property Custodian.

As above stated, we have no intention of repeating in this brief the carefully found facts.

Having in mind, however, that Brown was not employed at all in the office of the Alien Property Custodian until January 20, 1919 (R. 40), we emphasize that it was in February, 1917, that the Navy Department commandeered and seized the wireless station and patents and thereafter operated it (R. 27). The patents were owned by appellant, and the station and non-assignable licenses in the patents were owned by its subsidiary, the Atlantic Communication Company. The Trading with the Enemy Act establishing the office of Alien Property Custodian was first passed October 6, 1917. Prior to June 7, 1918, the Alien Property Custodian had seized the capital stock of the Atlantic Communication Company and installed his own directors and officers. In October, 1918, the Atlantic Communication Company acting through the officers installed by the Alien Property Custodian conveyed its real estate and other property and attempted to assign its right as licensee of the patents to the United States (R. 27).

In January, 1919, the Alien Property Custodian seized the rights of Telefunken in the patents and its rights as licensor with regard to the patents, and again seized the stock control of the Atlantic Communication Company (R. 28). Brown, however, had nothing to do with and no contact while in the office of the Alien Property Custodian with the case of Telefunken, as distinguished from that of the Atlantic Communication Company, nor anything to do with such seizures

or supplemental seizures as there may have been of the patents owned by Telefunken, nor with their conveyances to the Navy Department (R. 42).

As to the affairs of the Atlantic Communication Company, some time prior to June, 1918, they had been taken in charge on behalf of the Alien Property Custodian by important officials of that office and distinguished New York counsel, and the affairs of the corporation (in so far as it had any affairs, the actual operation of the station and the use of the patents being by the Navy Department) were administered exclusively from the New York office of the Alien Property Custodian and those in charge of its affairs reported, not through the division in which Brown was employed, as appellant represents (Brief, p. 36), but directly to the Custodian, A. Mitchell Palmer (R. 39-40). The negotiations for the sale to the Navy Department had occurred and were completed in September, 1918 (R. 40), and when on July 15, 1919, Brown as an employee in the Washington office had that contact with the affairs of the Atlantic Communication Company which is so much emphasized by appellant's counsel, the sale of the radio station and patents to the Navy Department had been fully accomplished and dissolution of the corporation itself was being held up owing to litigation involving the shell of the company. (R. 110, 132, 134). It seems to be overlooked by the appellant that the only action taken upon this report negatives any participation in the affairs of the Atlantic Communication Company by the Washington office in which he was employed for the action was "to confirm the previous reference" of the matter to the New York office (R. 42).

It should be borne in mind that the controversy between Telefunken and the United States was as to the consideration paid Telefunken. Our point in referring to the dates involved in the acquisition of Telefunken's rights is to show that matters of consideration had been completely disposed of by negotiations between the Navy Department and others before Brown was employed, and that before his employment Telefunken's assets had been so dealt with that its affairs and those of the Atlantic Communication Company consisted of the administration of what was left after the radio station and patents were gone, and principally of negotiations, and litigations with claimants against those companies, with the conduct of which Brown had no duties. Even if it be assumed, contrary to our view, that Brown was concerned in perfecting the Alien Property Custodian's title to Atlantic Communication Company stock, that was activity about a matter which never was brought into question between Telefunken and the United States nor could be. What Brown did in this regard in September, 1919, was found by the court to consist of identifying by his signature additional pages attached to supplemental demands seizing again this stock (R. 41). The insignificance of this signature is plainly enough shown by the testimony of his superior, Paul Smith (R. 125, 127). Our present point, however, is that the Custodian's title to the Atlantic Communication Company stock (nor even the title of the United States to Telefunken's former property) was not questioned either by Brown or his successors on behalf of Telefunken.

The complaint of Telefunken related to the substance of the transaction and is well stated in Brown's letter of November 24, 1923, written on behalf of Tele-

funken to the Alien Property Custodian, wherein he said (R. 104):

“that, in equity and good conscience, the United States must some time account either to our clients or on international settlement for the value of the property so taken. * * * We recognize * * * that it was necessary for the United States to take over this plant for its use during the war. Our clients do not complain of that fact nor is the manner in which it was done material to them.”

The similar position taken by the successor lawyers for Telefunken employed after these lawyers were discharged is shown in the extracts from two briefs before the Arbiter reprinted in the record (pages 262-264).

The connection between the Corporation Management Division in which Brown was employed, during the period of his employment, with the affairs of Telefunken or the Atlantic Communication Company, is fully stated when it is said, as was found by the Court, that the file “which eventually included these minutes, was accessible to him” (R. 41). It was the function of this Division, as the Court found (R. 40), to have a complete set of the corporate actions taken by corporations in which the Custodian had seized the capital stock. Even if it be assumed that Brown had read these minutes, as testified by Miss Cilley (R. 91, et seq.), though there is no finding indicating that the Court accepted Miss Cilley’s testimony as fully accurate, it appears from the course of the correspondence that these minutes were not sent down to Washington until months after the actions occurred (R. 93, 117). The real estate and other property of the Atlantic Communication Company had been conveyed

to the United States in October, 1918, and its interests and those of Telefunken in the patents had been conveyed to the United States by the close of the period covered by the Alien Property Custodian's report for 1918, which was the close of business February 15, 1919, as was found by the Court (R. 27-28). The information that this had been done was made public information by its publication in this report, printed as a Senate document, portions of which are reprinted in the record here (pp. 100-102). Before the time Brown was employed by Telefunken, not only this 1918 report but also the report of the Alien Property Custodian in response to a Senate resolution of January 5, 1922, had been published, in which was printed all and more information than would be found in the corporate minutes. This information is summarized in that portion of the bill of exceptions in which Brown states the sources from which he actually obtained his information about the affairs of the appellant and of the Atlantic Communication Company when he was employed by the appellant (R. 112-115).

Paul Smith, Brown's immediate superior in the Alien Property Custodian's office, John C. Tomlinson, Jr., the director and secretary of the Atlantic Communication Company acting for the Custodian about its affairs, and James A. Delahanty, the attorney for the Atlantic Communication Company during the period of management by the Custodian, all united in testifying with emphasis and detail that neither the Corporation Management Division nor Brown had anything to do with the conduct of the affairs of that corporation or the disposal of its assets to the Government (R. 122-136).

Under these circumstances, there being approxi-

mately six hundred corporations in the Corporation Management Division as found by the Court (R. 40), it becomes apparent that Brown's contact with this matter had been so casual and slight as to make credible his testimony that when the appellant came to his attention as a prospective client and when he was employed by it "he had no recollection that he had dealt in any way with Telefunken or Atlantic Communication Company affairs in the office of the Alien Property Custodian" (R. 112), and that even after the attempted stimulation of his memory by the testimony about it at the trial of this case, he did not remember at all having had to do with it in the Alien Property Custodian's office (R. 115).

Bearing in mind that it was the case of the Atlantic Communication Company, not that of the appellant itself, with which Brown is claimed to have been in contact, the finding of the court below is significant, as follows: "The affairs of the corporation were thereafter (from some time prior to June, 1918) administered exclusively from the New York office * * *. This case, however, had been referred to the New York office for liquidation before the appointment of Mr. Brown and the Corporation Management Division had no part in the matter thereafter" (R. 40-41).

These findings are certainly well founded on the testimony of Smith, Tomlinson and Delahanty, above referred to, as well as the testimony of Brown himself, and no argument can be founded upon any supposed contrary fact without asking this Court to reweigh the testimony.

It is certainly apparent that as a matter of substance having any real relation to the rights of the parties or their conduct, even if Brown had been able

by a photographic memory to summon to his aid every document bearing upon the case in the Alien Property Custodian's office, he would have had available no fact which had even the slightest bearing upon the rights of his client, Telefunken which was not equally accessible in other public records. All claim of participation by him as an actor in the taking of Telefunken's property was disproven. All claim that his knowledge of Telefunken had led to any solicitation by him or stirring up of the claim was disproven. All that was proven was that he had opportunity while in the Custodian's office to learn what had happened insofar as Telefunken's affairs were those of the Atlantic Communication Company. Before he was employed by Telefunken, this same opportunity had been extended to the public by the publication of the Custodian's reports.

The immateriality of Brown's prior employment by Telefunken becomes more apparent when one reviews what Judge Frankenthaler and Mr. Frankenthaler and Judge Nippert and Brown actually did for Telefunken by way of rendition of professional service.

Facts and Considerations Concerning the Services Rendered.

This service was not, as one might suppose from the opening paragraph of appellant's brief, merely the procurement of the passage of certain legislation. If it had been, the immateriality of Brown's prior employment by the Custodian would only be made more apparent.

We again refer to the facts carefully found by the Court, particularly paragraphs 6, 7, 8 and 10 of the findings (R. 30-39).

This service included assistance rendered to the Alien Property Custodian as trustee of the trust of which Telefunken was the cestui. Evidence of the appreciation of the Custodian for the assistance rendered by appellee as attorney for appellant in the defense of a suit brought by the National Signalling Company is brought up by the appellant in its bill of exceptions (R. 106-107). Service in this same matter at a later stage is referred to in the Court's finding numbered 10 (R. 39), which is not questioned on this appeal.

We have referred above to the fact that the findings granted by the Court at the request of the appellant were principally to emphasize certain unrelated facts which taken out of their context, so to speak, appear favorable to appellant. As illustrations of this, we call attention to findings 30 and 31 made at the request of appellant (R. 45), from which taken alone it would appear that the failure of the appellee and his associates to bring the litigation to which the Atlantic Communication Company was a party to a settlement in some degree reflected upon the efficiency of the service rendered by these lawyers to the appellant. When, however, these findings are read in connection with the facts stated in finding numbered 10 (R. 39), it becomes apparent that it was the contrivance of Dr. Frank, who was then working toward the discharge of these lawyers, which prevented the rendition of more effective service by them in this litigation.

The service consisted also and notably in the consideration and avoidance by these lawyers of mistaken remedies which might have delayed or, if a course similar to that followed by the former owners of the German chemical patents had been followed, might

have resulted in the complete loss of any remedy by adverse adjudication. Attention is called to the summarized statement of these services made in finding numbered 6 (R. 30-31).

Bearing upon the legal problems dealt with in the search for a remedy for appellant which culminated in the decision that the claim must be presented to Congress, we remind the Court of facts which were of public and general knowledge in the post war period. Private property of all kinds owned by Germans and located in this country had been seized and was held by the Alien Property Custodian, and its owners after the war were pressing for the return of it or the proceeds of its sale. German ships, privately owned, had been seized directly by the United States, not through the Alien Property Custodian, and claims against the Government were being pressed by the former owners of the ships. A large group of enemy owned chemical patents which had been seized by the Alien Property Custodian had been sold to the Chemical Foundation for a comparatively nominal consideration and the claim made on behalf of the owners of those patents was that a return to them by the Alien Property Custodian of only these proceeds of sale would amount to confiscation of their patents. On the other side of the picture, claims owned by Americans arising out of the sinking of ships by the Germans at sea and other claims of American citizens against Germany arising out of the war were being pressed for settlement, and there had been set up the Mixed Claims Commission to determine the amount of these claims prior to the making of any provision for the payment of the awards to be made by the Commission.

The events giving rise to the claim of the appellant were in some respects similar to those giving rise to

the claims of the German ship owners and in some respects similar to those of the German owners of the chemical patents. The similarity to the ship claims was in the fact that the seizures of the radio station and patents were by the Government and were accomplished without the interposition of the Alien Property Custodian. The similarity to the Chemical Foundation case was that there was in the case of the radio station and patents a sale for a nominal consideration by or under direction of the Custodian to perfect legal title. In the Chemical Foundation case, however, the sale was to a private corporation. The similarity of the problem before Telefunken's lawyers to the case of the chemical patents was publicly stated by Hon. Francis P. Garvan, through the Associated Press, as follows:

“The Chemical Foundation case will become a governing precedent in the sale of all wireless patents and plants to the United States Government for the nominal sum of \$140,000. These were all sold to the government for what, of course, is an inadequate price.” (R. 104).

There had been at the time these lawyers were employed by appellant no determination by the United States of the manner in which these several problems were to be solved. And as the court below found, “the legal problems involved in the matters committed by Telefunken to plaintiff and his associates were during the period of their employment of difficulty and delicacy. The questions involved were novel” (R. 30).

Counsel interested in the claims of the owners of the chemical patents induced the Government to bring suit to cancel the conveyance of the patents to the Chemical Foundation and to attempt to recover back

the patents into the ownership of the Custodian, and the failure of that effort by the decision of the United States Supreme Court in October, 1926, is well known. The German ship owners brought direct suit against the United States in the Court of Claims, but this effort was equally unsuccessful, and they obtained no remedy until they presented their claims to Congress along with those of Telefunken and a provision for the ascertainment of what was due them and its payment was made by the Settlement of War Claims Act March 10, 1928.

When these publicly known facts are recalled, it becomes obvious that even if the sole legal problem committed by appellant to these lawyers had been to get for it a remedy for the seizures of its property, it would not be fair to summarize what they had to do by saying that they base their claim upon securing the passage of an act by Congress.

It needs be recalled also that until Congress authorized return of alien property, any recovery in any suit that might be brought by Telefunken to get additional compensation for or in any wise questioning the transfer of its properties to the Navy Department would have resulted only if successful in the recovery of funds or property to be added to those held by the Alien Property Custodian. Until the return of property was authorized by Congress, and then only to the extent that it was authorized, the Custodian remained the trustee for Telefunken and anything recovered by the efforts of the cestui would go to increase the trust fund held by the trustee. No suits of this character were ever brought, but appellant argues about the possibility of such suits as though they would have been adverse to the Custodian whereas in fact any

such suit would have been only in aid of his administration of his trust.

An affirmative accomplishment by these lawyers for Telefunken was, of course, the inclusion in the Settlement of War Claims Act of March 10, 1928, of a provision for an award by the War Claims Arbiter and the payment of the award of fair compensation in respect of—

“any radio station (including any equipment, appurtenances, and property contained therein) which was sold to the United States by or under the direction of the Alien Property Custodian”

and for

“any patent (or any right therein or claim there-to, and including the application therefor and any patent issued pursuant to any such application) which was licensed, assigned or sold by the Alien Property Custodian to the United States.”

(45 Stats. 256)

No radio station other than that of Telefunken had been taken by or sold to the United States, and this provision was applicable only to it, and was pointed out by Mr. Brown to the House Committee (R. 242).

The notable professional service rendered by these lawyers to appellant was in those services which the Court found were a material contributing factor to the accord between the German and American claimants which accord was the material and proximate cause of the enactment of this statute (R. 34).

**The Court Below Found Against the Claim of
"Lobbying" and There Was None.**

A defense interposed below on the facts, which is dropped on this appeal, was that this accord was brought about by Dr. Kiesselbach, the German Mixed Claims Commissioner on behalf of the German claimants, and by the witness Sidley, Chairman of the American Claimants Committee, and others of the American Claimants Committee, including Mr. Betts, who was counsel for Telefunken in the court below, and that the part played by the plaintiff lawyers therein was minor and inconsiderable.

If appellant's counsel had been able to persuade the court below that as a matter of fact the accord between the American claimants and the German claimants, and their mutual concessions, which made it possible to have this act passed with the support of the executive department of the government, had been the result of the professional labors of Dr. Kiesselbach and Dr. von Lewinski on the German side and appellant's witness Sidley or its witness Otis or others of the American Claimants Association on the other side, so as to avoid the finding that the lawyers who were working for Telefunken made a material contribution to the successful result, then we may assume that appellant's counsel would join in the general praise of what was done as a notable professional accomplishment. Dr. Kiesselbach, who represented the German ship owners particularly and all German claimants generally, was acclaimed for the accomplishment on his return to Germany and was made a handsome money present by the private interests involved (R. 271). But having failed in its efforts to prove that

what was done was not accomplished by appellee and his associates, Telefunken now seeks to have this Court find that the accomplishment was had by methods contrary to public policy, that is, by "lobbying".

It has been noted above (page 6) that the effort to establish here a fact of "lobbying" is made merely by including testimony in a bill of exceptions without any exception as to matter of fact to which the testimony is relevant.

Testimony principally so relied on is a question and answer quotation from a portion of the cross-examination of the appellee Brown (appellant's brief, pp. 83-92). Without conceding that appellant can properly ask this Court under such circumstances to consider testimony and make an additional finding of fact inconsistent with those found by the trial justice, we ask that the Court consider this effort by the appellant, if at all, in the light of the following proven facts:

The supposed "lobbying" had to do, of course, with the actual passage of the legislation by Congress. Early in his testimony appellee Brown had stated that as between him and Judge Nippert, in the legislative history of the several bills during 1926, 1927 and 1928, Judge Nippert was at all times *exclusively* in charge of the legislative end of it (R. 106). As to an alleged episode included in this cross-examination of Brown, he testified that he was at the time temporarily out of touch with Judge Nippert and his own knowledge of it was after the fact (R. 187). When Brown had been asked on direct examination whether the final bill had administrative backing, he had suggested that this question be asked of Judge Nippert as his memory on it was not clear (R. 242). The portion of the cross-examination of Brown upon which appellant relies

was based upon cross-examining counsel's memorandum (of which he had given Brown no copy, R. 188) of a conversation between cross-examining counsel and Brown when Brown had come to counsel's office to discuss settlement of this case (R. 189). Brown pointed out that in such a conversation he might not have distinguished between hearsay and actual knowledge (*id.*).

As we understand appellant, it claims that this cross-examination proves that Brown "lobbied" or "log rolled" this legislation through Congress by threatening Mr. Houston, attorney for the American insurance claims, that he would have Senator Howell make a speech against the insurance claims unless Telefunken was taken care of in the bill. Any such supposed incident is negatived by all of the other evidence and also by the Court's findings.

Houston's emphatic denial that there was any such deal is contained in his testimony (R. 217-219, and see R. 204, 205). Brown's own account of Judge Nippert's and his relation with Mr. Houston and his firm showed that this relation remained cordial and close throughout. "Mutual confidence was the basis of the relationship; there was no give and no take and no monetary interests or clients in common". They had agreed that if the time came when either of them saw their interests were separate, they would notify the other and therefore part (R. 243). Judge Nippert described their arrangement with Mr. Houston as one of "cooperation" (R. 259).

Apparently the appellant would stigmatize any argument addressed to an individual legislator instead of to a committee as "lobbying". The kind of argument which Judge Nippert addressed to individual leg-

islators is well illustrated by his letter to Senator Borah of November 22, 1925 (R. 254-255). Such an argument addressed to reason and not relying upon personal influence or favor was made by Judge Nippert to Senator Borah and to other leading legislators whose confidence he had. It would be a strange doctrine which would convert a legitimate argument into an improper attempt to use influence by reason of the fact that the lawyer deserved and had the friendship and confidence of the legislator.

Among the many examples in the record of perfectly proper and lawyerlike advocacy on the part of Judge Nippert are his furnishing of data in a memorandum form to Hon. Cleveland A. Newton of Missouri (R. 256), his collaboration with Dr. von Lewinski on arguments, figures, legal considerations and data to be presented to Congress (R. 257), and the argument he used to Mr. Longworth to point out the danger in pressing the first Green Bill which Judge Nippert was convinced would be defeated and the defeat of which he thought would do irreparable damage to an ultimate return bill (R. 260).

That Judge Nippert, the only one of the group who was in contact with the legislators (excepting for Brown's appearance before the Ways and Means Committee) was in no sense a lobbyist by experience is shown by the statement of his own prior experience in advocating legislation (R. 261). The incident involving Senator Howell concerning which a cross-examination of Mr. Brown is so much stressed by appellant is fixed by the cross-examiner's question as occurring at the time the radio claims were left out of the bill (R. 189). It seems apparent from the other testimony that it would be Judge Nippert and not Mr. Brown

who actually knew what occurred in that matter and quite likely that Brown had no accurate information or memory about it. What the court below found about this was as follows:

“Judge Nippert had taken appropriate steps, through Senators whose attention he had directed to this deficiency in the bill, to have the provision restored when the bill died March 3, 1927, by reason of a filibuster directed against other legislation” (R. 37).

The findings of fact characterize the legislative advocacy carried on on behalf of these lawyers as follows:

“In the course of this and further legislative efforts, Judge Nippert was most active and was at all times an influential factor, valuable to Telefunken. He had access to and the confidence of Speaker Longworth of the House, Senator Borah, Chairman of the Committee on Foreign Relations, and other legislators. He openly and explicitly revealed to them his representation of Telefunken and of other German claimants and *his advocacy was by way of arguments addressed to their reason*. He and plaintiff and their associates were of opinion, which opinion was proven correct by the result, that the interests of all of their clients, that is, those who had similar claims for return of property held by the Alien Property Custodian, as well as Telefunken, would best be served by advocating no bill which did not provide a comprehensive plan for the settlement of both classes of claims and the ship claims, as well as the American claims, for the reason that any bill which did less was not within the purview of the accord which had been reached between the several classes of claimants and could not command sufficient support to be enacted.” (R. 35-36)

To characterize cooperative effort founded upon sound reasons between the several classes of claimants as "log rolling" because it involves an agreement between persons whose interests might otherwise be antagonistic is to confuse two totally dissimilar things. Not only was the agreement and cooperative effort approved by the court below, but it had been suggested and encouraged by Chairman Green of the Ways and Means Committee in an open hearing of the Committee (R. 207).

Appellant attempts to give some sinister aspect to the activities of its lawyers in securing cooperation between the several classes of claimants and mutual concessions by them and in advocating the agreed plan of legislation as an entirety. This portion of appellant's brief is quite extensive (pages 73-109). We are unable to catch the relevancy of much which is there narrated. It seems fair to assume that what appellant italicizes is what appellant considers important and significant. A long italicized portion appears in a résumé of part of Mr. Houston's testimony printed on pages 95 to 96 of the brief. This deals with Judge Nippert's opposition to what was known as the first Green or partial return bill. The finding of fact by the court below on this point as to this activity on the part of Judge Nippert was as follows (R. 36):

"Consistently with this view (that is, the opinion proven correct by the result, that Telefunken's interest would be best served by advocating no bill which did not provide a comprehensive plan as described in the court's findings), he effectively opposed, through Speaker Longworth, any report to or consideration by the House of Representatives of the first Green Bill, House Bill 12643, 69th Congress, 1st Session, which, while it purported

to provide for the interest of Telefunken, did not provide for the return of German property generally nor for all American claims. This bill was opposed also by Dr. Kiesselbach and Mr. von Lewinski, and not advocated by the Treasury Department, upon similar grounds."

Appellant's witness Otis, Secretary of the American War Claimants Association, testified as to this (R. 268):

"witness did not personally favor the passage of this Bill and witness knew he was acting in accord with the views of most of the members of the Committee, including Mr. Houston; witness was conferring with Dr. von Lewinski at this time; in connection with the cross-examination of this witness there was introduced in evidence a letter from Dr. von Lewinski under date of June 1, 1926, a part of Plaintiff's Exhibit No. 158, written to the Assistant Secretary of the Treasury at the request of Dr. Kiesselbach, protesting against the proposal embodied in the Green Partial Return Bill upon the ground that the consents of the German owners to the use of the unallocated interest funds were given upon the understanding that the entire problem was to be dealt with when the fund was used; witness does not recall the letter but would have concurred in the expressions there made concerning the Green Partial Return Bill".

Judge Nippert's letter to Mr. Longworth containing the arguments he urged upon him about the Green Partial Return Bill is printed in full in the record (pages 172-175).

As above stated, we are not clear as to what sinister inference appellant is attempting to have drawn by emphasizing by italics this section of Mr. Houston's

testimony, but if the thought is that the fact that Mr. Sidley was not kept informed and that there was therefore something to be concealed about Judge Nippert's activity, the foregoing additional facts, which were among others before the court below when it made its findings above quoted, should dispel any inference appellant now attempts to have drawn that any objectionable "lobbying" on its behalf was here involved.

For definitions by the Supreme Court of proper professional services in support of claims requiring legislation for that enforcement, see the cases hereinafter listed and digested (*infra*, pp. 49-54), particularly *Winton v. Amos*.

**Recovery of Pay for Services Rendered is Not Barred
as Matter of Law by Brown's Prior Employment
by Alien Property Custodian.**

In dealing with this question, appellant gives controlling importance to the case of *Brown v. Miller*, 52 App. D. C. 330, 286 F. 994. The facts surrounding that case and the dates when it was brought into this Court, with reference to the date of Brown's employment in the present case, are exhaustively stated. There are several important facts coupling that case even more closely to this one which appellant studiously fails to state.

One is that the trial justice who decided *Brown v. Miller* in the court below is the identical trial justice, Honorable Jennings Bailey, before whom the present case was heard. In that case Justice Bailey held and this Court in its opinion (page 333) quoted his statement with approval:

“Now, under the conceded facts in this case, Mr. Brown had such connection with this matter that I think renders it, I will not say grossly improper, but I think very inexpedient, for him to represent the plaintiff in this case.”

In the present case, it was the identical justice who made the detailed findings of fact upon which we rely and who under the circumstances of this case said (R. 53):

“In my opinion the action is not barred by the fact that the plaintiff had been an attorney of the Alien Property Custodian, and had been connected with the administration of the properties of the defendant seized by the Custodian.”

Another notable fact is that the principal moving paper in *Brown v. Miller*, as appears from the record in that case in this Court, No. 3823 April Term 1922 (page 19), was an affidavit of Paul Smith, Chief of the Division of Corporation Management of the Office of the Alien Property Custodian. This is the identical Paul Smith produced as a witness for the appellee Brown in the present case and upon whose testimony we rely as upholding the finding of fact made on this point by the court below. He testified inter alia:

“The witness personally looked to Judge Delahanty to take care of the Alien Property Custodian’s interest in the company, and Mr. Garvan did the same; * * * that the Atlantic Communication Company was referred to the New York office for liquidation and was liquidated, and thereafter the Corporation Management Division played no part in the matter.” (R. 124)

The attorney for the Custodian who appeared in the case of *Brown v. Miller* in this Court, Dean Hill Stanley, is the identical attorney who as attorney for the Alien Property Custodian wrote to the appellee Brown as attorney for Telefunken under date of December 27, 1926, expressing appreciation for assistance rendered him in the defense against the suit of the National Signalling Company (R. 106-107).

The uncontradicted testimony of Brown in the present case was that immediately after the decision in *Brown v. Miller*, he consulted Mr. Paul Smith, upon whose affidavit the court had taken action, gave Smith a list of his representations that might affect Corporation Management, and Smith within a couple of days told him that the files had been gone through and no other representations had been found in which the Custodian might raise the same or similar objection (R. 118-119).

It was on July 5, 1922, that Brown first conferred with Custodian Miller and subordinates and informed them of his representation of Telefunken and urged the Custodian to examine into the consideration for the sale to the Navy Department of the wireless station and patents, and on July 6, 1922 he wrote the Custodian along the same lines (R. 103). There never was any objection made by anyone connected with the Custodian's office to Brown's representation of Telefunken (R. 119). This fact is one mentioned by the court below (R. 53).

Further in connection with the case of *Brown v. Miller*, and as further demonstrating what we think obvious, that any disability on the part of Brown to appear against the Alien Property Custodian must depend upon the facts of the particular case, we call attention

to the fact that *Brown v. Miller* was submitted to this Court November 3, 1922, 52 App. D. C. 330. In the case of *Miller v. Schutte*, 52 App. D. C. 359, submitted to this Court December 15, 1922, Dean Hill Stanley appeared for the Custodian and Mr. Brown and Judge Nippert appeared for the appellees. In *Transatlantic Trust Company v. Pagenstecher*, 53 App. D. C. 42, submitted December 14, 1922, involving the Alien Property Custodian, our information is that in Equity 39810, this case below, Mr. Dean Hill Stanley appearing for the Custodian stated that there was no objection to Mr. Brown's appearing against the Custodian. The ultimate fact, apparent in the report, is that Brown appeared for the appellee here.

These cases were practically contemporaneous ones here, and below before the same trial judge who decided *Brown v. Miller*.

In appellant's brief (pages 40-41) Mr. Brown is criticized by appellant's counsel for having accepted employment by Telefunken in apparent defiance of the decision in *Brown v. Miller*. The actual contemporary facts, as above recited make it apparent that this criticism is entirely unfair.

If it was contrary to law or to any genuine "public policy" for Brown, because he had been employed by the Custodian, to represent Pagenstecher or Schutte as administrator against the Custodian, no acquiescence by the Custodian would have cured the evil. It must have been the contemporaneous view of those concerned in *Brown v. Miller* that it made a difference whether the Custodian objected or acquiesced in Brown's representation of a particular new client. This view was reasonable and in accordance with law, because when representation of a client by an attorney

is objectionable on the ground of prior employment by another, the objection is not founded on illegality or "public policy", but upon ethical considerations for the protection of the former client.

The objection to a contract by which a lawyer undertakes to represent a new client about the same subject matter is different in substance and in origin from the objection to an illegal contract. Where a contract is illegal as, for example, contracts in restraint of trade or contracts to bribe public officials, the objection arises from a predominant public policy. Therefore in such case the consent of the parties is immaterial. The law of its own motion will withhold its aid from the parties to such a contract. On the other hand, the objection to a lawyer changing clients is like the objection to an agent representing both principals. It is a part of the same rule of law (see 2 R. C. L. 973). No public interest is involved,—there is nothing vicious or repugnant to the policy of the law in such an arrangement,—it promotes no illegality. A lawyer may represent a new client with a possible conflict of interest with his former client if the former client with full knowledge does not object. The so-called public policy is for the protection of the parties directly concerned. *Volenti non fit injuria* applies. The acquiescence of the parties not merely avoids the objection, but prevents the objection from arising at all.

The failure of the old client to object has this further significance: All the authorities dealing with the "public policy" here involved agree that to be objectionable the new representation must be adverse to the old. The former client, having knowledge of the new representation, will naturally object if the new representation is actually adverse. Therefore the failure to

object is strong evidence that the parties themselves considered that the new representation was not adverse to the old, and if it was not, all possible objection to it on the ground of "public policy" is removed.

Brown's former employment had been by the Alien Property Custodian as distinguished from the United States.

That there was a legal distinction between the Custodian and the United States could be argued from the terms of the Trading with the Enemy Act, wherein it is provided that the Custodian shall be vested with the powers of a common-law trustee and wherein sales from the Custodian to the United States are contemplated (Act of October 6, 1917, c. 106, par. 12, 40 Stat. 423, as amended by Act of March 28, 1918, c. 28, par. 1, 40 Stat. 460).

But is no longer necessary to reason from the terms of the statute. The Supreme Court and this court have made clear the distinction between the United States and the Alien Property Custodian and have held that determinations of fact made by the Alien Property Custodian, affecting the interest of the United States and questioned by it, were conclusive and could be established in other cases by his admission in an answer interposed in one case (see *White v. Mechanics Securities Corporation*, 269 U. S. 283, 70 L. ed. 275, affirming 55 App. D. C. 261, and under the title of *U. S. v. Securities Corporation General*, 55 App. D. C. 256).

Upon the authority of and consistent with the reasoning of the opinions in the case cited, it is submitted as settled law that Brown's old employer was the Custodian and no other agency of the United States; that it was peculiarly and probably exclusively within the power and right of the Custodian to determine whether

the new employment of Brown was adverse or inconsistent with any duty owing by Brown to his old employer, and whether any objection lay to it as likely to result in the betrayal of his former client's confidence. The Custodian, having evidenced by his acquiescence, personally and through his counsel, that he had decided that there was no adversity of interest in this case, that decision needed no support from any other officer or agent of the United States to make it effective. However, it is unnecessary in the present case to attach such controlling importance to the Custodian's acquiescence in Brown's employment by Telefunken. It is enough for our present purposes to treat it as evidence that there was no adversity between his representation of Telefunken and his former employment, and that he had not been so employed about the affairs of Telefunken as to gain any confidential information which might be used to the injury of Telefunken or the Government.

It is noteworthy that the opinion of this Court in *Brown v. Miller* does not purport to be upon any basis of "public policy", nor does it use the term. The opinion is exclusively on the principle of legal ethics and deals with the protection of the interests of the objecting former client. It concludes:

"Officers of the government, employing attorneys, are entitled to the same protection against unprofessional conduct on their part as are private citizens, and attorneys so employed owe the same fidelity to such employers as to other clients."

It is obvious that this defense in this case was inspired by the decision in *Brown v. Miller*. The opin-

ion in that case, however, very plainly shows the vital difference between the two cases. In that case the Court believed that Brown was using against the Custodian information which he had gained while in the Custodian's employ. The Court believed that Brown could not have so pointedly framed the interrogatories attached to his bill of complaint without a knowledge which he could have gained only from the Custodian's file. That case was therefore one in which the Court believed that a mischief would be worked and a harm done in violation of professional duty on Brown's part. The suit was against the Custodian and the Custodian was complaining. The objection was based on substance and was not availed of, as here, as a mere technicality by which to escape the payment of a moral debt. The facts upon which Brown acted were believed by the Court not to have been, as here, facts which he had learned and anyone could have learned from sources other than the Custodian's file.

It will be found by an examination of the authorities that the true rule is consistent with the opinion in *Brown v. Miller*, viz, that the rule is founded upon reason. It does not preclude an attorney from dealing with the same subject matter on behalf of the new client arbitrarily and without regard to the evils against which the rule is aimed.

The rule has its foundation in the English common law. The rule in England was rather fully restated in the case of *Rakusen v. Ellis, Munday and Clarke* (1912), 1 Ch. (Eng.) 831. In that case Clarke of the firm of Munday and Clarke had been engaged by Rakusen to bring suit against a company. After several consultations Rakusen changed solicitors. Then Munday and Clarke were retained as counsel for the

company, and Rakusen sought to enjoin them from appearing for it. Couzens-Hardy, M. R., said:

“* * * in my view, we must treat each of these cases not as a matter of form, not as a matter to be decided on the mere proof of a former acting for a client, but as a matter of substance; before we allow the special jurisdiction over solicitors to be invoked, we must be satisfied that real mischief and real prejudice will, in all human probability, result if the solicitor is allowed to act.”

Buckley, L. J., concurring, said:

“There is no general rule that a solicitor who has acted in a particular matter for one party shall not under any circumstances subsequently act in that matter for his opponent. Whether he will be restrained from so acting or not depends on the particular circumstances. Of course he will be restrained from communicating confidential information, but the respondents contend that, when there is no danger of this happening, the solicitor will still be restrained from acting. * * * In my opinion neither of these propositions can be maintained. * * * There is no law that, because a solicitor has acted for a person, he may not afterwards act against him in the same matter. It depends on circumstances whether he shall be allowed to act or not.”

In *Bricheno v. Thorp* (1821), 37 Eng. Reprint 864, Lord Eldon said, dealing with a similar state of facts:

“It did appear to me that this was going very far, and I thought that before thus shutting up the sources of employment, it was incumbent on the court to see that there was something more than hypothetical mischief to be guarded against.”

See also *Parrott v. Parrott*, 64 Eng. Reprint 116; *Grissell v. Peto*, 131 Eng. Reprint 514; and *Robinson v. Mullett*, 146 Eng. Reprint 488.

Cases could be multiplied to the effect that the subsequent employment to be objectionable must be actually adverse to the interest of the former client.

Formal adversity, that is, the mere fact that former counsel for the defendant is now counsel for the plaintiff with regard to the same subject matter, will not violate the rule. The facts can always be examined to ascertain if counsel is taking a position actually hostile to that which he formerly had. Thus in—

Shaw v. Bill, 5 Otto 10, 24 L. ed. 333, the Supreme Court, through Mr. Justice Field, said:

“It seems that when the petition of Shaw for the appointment of a receiver was presented to the court, Mr. Hendricks, with others, appeared as special counsel for the company, and moved its dismissal. Subsequently, Mr. Hendricks appeared as counsel for the trustee in the proceedings on the supplemental bill for the foreclosure of the mortgages, and on his motion the default of the company was entered. This second appearance of counsel against the company is regarded by the appellant as exhibiting ‘an anomaly in chancery practice’ so great as to vitiate the decree. We do not perceive any anomaly or irregularity or impropriety in the conduct of the counsel. He might very well have appeared for the company to defeat a petition of a single creditor asking for the appointment of a receiver of its property, and yet subsequently have appeared for the trustee, to foreclose its mortgages. There was nothing in the duties required on the motion which in any way conflicted with the duties required in the subsequent proceedings. There is not even a colorable pretext for calling in question the propriety of the action of counsel.”

Telefunken's counsel here invoke "public policy" and denominate Brown's contract "illegal" as contrary to public policy. In our view they approach the subject with a failure to appreciate that the term "public policy" is really inapplicable to some situations to which it has been somewhat loosely applied. Such are contracts for services not opposed to good morals nor statute law, but which may run counter to some accepted tenet of legal ethics bearing upon the relation between the particular attorney and the particular client involved.

An examination of the decisions holding contracts of this kind to be contrary to public policy will show that the courts have first found a violation of legal ethics, and thereupon without need to find more than a violation of ethics have gratuitously added some references to "public policy". As above noted, this Court in *Brown v. Miller* did not use the phrase "public policy."

The rule it enforced is substantially that stated in the canons of professional ethics of the American Bar Association. Canon 37 reads as follows:

"The duty to preserve his client's confidences outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involved *the disclosure or use of these confidences*, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, *without his knowledge and consent*, and even though there are other available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client." (Italics ours; see Vol. 56 Reports of the American Bar Association.)

It seems too obvious to require discussion that no duty of Brown to his new client, Telefunken, was left undone or slighted or interfered with. This is proven by the result.

Whether or not, as a matter of terminology, it is appropriate to say that a contract which is not opposed to good morals nor to statute law, but which may run counter to a lawyer's professional duty, dependent upon the circumstances, violates "public policy", the real examination by the court in such a case is on the basis of legal ethics. All of the circumstances, including the consent or acquiescence of the parties, become material in such a case.

When such a question is raised by a complainant who alleges actual or impending harm to him, and when the relief sought is the dismissal of the attorney, the disposition of it may be summary and without minute examination into the niceties of the situation; but where legal relief other than dismissal of counsel is sought, the actual occurrences are fully probed to discover if actual injury has resulted. See Judge Lurton's opinion in *Davis v. Chattanooga Union Ry. Co.*, 65 F. 359.

It seems to us of the utmost importance and significance that appellant's counsel have not cited and we have not been able to find any case wherein a lawyer who has rendered service has been denied his fee upon the ground of this supposed public policy as distinguished from violation of statute or true public policy as above distinguished.

The only adjudicated case which we have been able to find in which the question arose in the manner in which it here arises in *Patterson v. Fleenor* (1905), 28 Ky. L. 582, 89 S. W. 705, in which the plaintiff did not

have as strong a case as does the plaintiff here. The plaintiff suing for his fee as attorney recovered below. It was insisted for the appellant that the appellee had represented another and adverse party in the same suit before he represented the appellant. The court said there was no serious controversy between the two parties represented by appellee, and that appellee did not appear to have done anything in the case for the former client after he began to act as counsel for appellant; that in the absence of proof to the contrary, it is but fair to presume that in quitting the service of the former client and entering that of appellant in the same case, appellee acted with the consent of the other party, or that there was no real conflict in interest; that the former client does not seem to have a grievance against appellee on account of his representing appellant, and that if any complaint had been made by him on that score, appellant would have taken his deposition to prove the fact. The opinion continued:

“In this case Caldwell (the former client) is making no complaint that appellee left his service as attorney to enter that of appellant, and the latter having accepted his service with knowledge acquired from the record that he had acted as attorney for Caldwell, and having profited by his service in his (appellant's) behalf, is estopped to complaint of that fact.”

Similar considerations led to a holding that the defendant had no standing to invoke a principle of public policy for his own relief in *Todd v. Rhodes* (1920), 108 Kans. 64, 193 Pac. 894.

Appellant's brief (p. 50) relies upon *In re Boone* (D. C.), 83 F. 944. Boone was disbarred because he was guilty of a heinous case of betrayal of a client.

He had procured from an unsuspecting client a blanket release with a concealed intent to seek employment of the client's adversary, and he sought that employment by offering to use his confidential knowledge of the weakness of his former client's case. Certainly there can be no similarity between the present case and one in which an attorney so tricked his client, and then sought to defend his betrayal by producing the release. To quote that case to the effect that "a client can not consent that an attorney should be released" as though the quoted phrase applied to the facts of the case at bar, or expressed the general rule, is to misapprehend the effect of that case. To quote it to any other effect is of no significance to the present case.

Only Where it Clearly Appears that a Contract Contravenes Public Policy will it be Declared Illegal on that Ground.

The Courts are justly suspicious of the defense of public policy.

"It is never argued at all but when other points fail." *Richardson v. Mellish*, 2 Bing., 229.

"This is generally the last defense of desperate causes." *South Carolina & G. R. Co. v. Railway Co.*, 93 Fed. 543, 558 (C. C. A. 4).

In *Steele v. Drummond*, 275 U. S. 199, 205; 72 L. ed. 238, 248, the Supreme Court said:

"It is only because of the dominant public interest that one, who has had the benefit of performance by the other party, is permitted to avoid this own obligation on the plea that the agreement is illegal. And it is a matter of great public concern that freedom of contract be not lightly interfered with. * * * It is only in clear

cases that contracts will be held void. The principle must be cautiously applied to guard against confusion and injustice. * * * *Richardson v. Mellish*, 2 Bing. 229, 242, 252, 130 Eng. Reprint, 294. Detriment to the public interest will not be presumed where nothing sinister or improper is done or contemplated. *Valdes v. Larrinaga*, 233 U. S. 705, 709, 58 L. ed. 1163, 1165."

In *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U. S. 357; 75 L. ed. 1112 (May, 1931), the Supreme Court said:

"The meaning of the phrase 'public policy' is vague and variable; courts have not defined it and there is no fixed rule by which to determine what contracts are repugnant to it. The principle that contracts in contravention of public policy are not enforceable should be applied with caution and only in cases plainly within the reason on which that doctrine rests. It is only because of the dominant public interest one who, like respondent, has had the benefit of performance by the other party, will be permitted to avoid his own promise. *Steele v. Drummond*, 275 U. S. 199, 205, 72 L. ed. 238, 240, 48 s. ct. 53; *Black & W. Taxi & Transfer Co. v. Brown & Y. Taxi & Transfer Co.*, 276 U. S. 518, 528, 72 L. ed. 681, 685, 57 A. L. R. 426, 48 s. ct. 404; *Holman v. Johnson*, Comp. 1 pp. 341, 343, 98 Eng. Reprint 1120."

In *Godfrey v. Roessle*, 5 Appeals, D. C. 299, 303, the Court of Appeals said:

"After a party has deliberately made his contract, and received the consideration therefor, it must plainly appear that it contravenes public policy before the courts will declare it void upon that ground. For, as said by the Master of the Rolls, Sir George Jessel, in *Printing Co. v. Samp-*

son, L. R. 19 Eq. Cas. 462, 'It must not be forgotten that we are not to extend arbitrarily those rules which say that a given contract is void, as being against public policy, because if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore, we have this paramount public policy to consider—that we are not lightly to interfere with this freedom of contract.' That is but saying, that substantial justice and the obligation of contracts are entitled to superior consideration to the vague and indefinite notions of public policy, urged to avoid a contract for which the party has received full consideration. Such a defense always comes with a bad grace from a party to the contract who has received full consideration, and enjoyed the fruits of the contract that he alleges to have been made in contravention of law or principles of public policy."

In *Ireland v. Craggs*, 56 Fed. (2d) 785, C. C. A. 5th, March, 1932, the Court said:

"It is the rule generally that, where one tardily ascertaining, after he has had the fruits of a contract, that his agreement was illegal, invokes the public interest 'the interest of others than the parties,' *Beasley v. T. & P. R. R.*, 191 U. S. 492, 24 S. Ct. 164, 166, 48 L. Ed. 274, to enable him to keep the fruits of his contract without standing to his bargain, courts are slow to follow such interested leading. They will cautiously determine for themselves whether there is a dominant public interest, and 'interest of others than the parties,' involved in the enforcement of the contract sufficient to overthrow the fundamental public

policy that men full grown and of sound mind may not, while holding to the benefits of a contract, escape its burdens. *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U. S. 353, 51 S. Ct. 476, 477, 75 L. ed. 112; *Baltimore R. R. v. Voight*, 176 U. S. 505, 20 S. Ct. 385, 44 L. Ed. 560."

A Contract Whereby Lawyers for a Contingent Compensation Agree to Prosecute a Claim Which Requires Legislation for its Recognition or Enforcement is not Against Public Policy.

There were included in some opinions, principally in earlier cases, broad expressions which were sound enough as applied to the facts of those cases, but which are misleading and not consistent with what is now the settled law.

To delimit the line of cases in which there is a conflict, within which line of cases the case at bar does not belong, a clear distinction is to be drawn between contracts for the prosecution of claims against the Government as, for example, debt or contract claims which may require legislation and appropriation for their recognition and payment, on the one hand, and contracts for the procuring of legislation authorizing a purchase or contract or granting some other advantage or benefit to which the client has no existing claim, on the other hand. Contracts for services by lawyers on contingent compensation in the former class of cases have been upheld. Contracts of the latter class are those in which there is conflict of decision; they have been condemned as against public policy by most federal cases though there has been some relaxation of the rule in the federal court and much relaxation of it in the state courts. We are con-

cerned in the case at bar with the former class of cases, contracts for the prosecution of claims.

A most concise statement of this distinction is to be found in the case of *Hazelton v. Sheckels*, 202 U. S. 71, 50 L. ed. 939, in the prevailing argument of the late Mr. J. J. Darlington, the distinction being recognized by a brief sentence in Justice Holmes' opinion.

Mr. Darlington argued:

“A contract not to prosecute before Congress, acting in a quasi judicial capacity, a claim of right, but to seek to obtain from it, in its purely legislative capacity, and for a contingent compensation, a contract of purchase or other advantage or benefit to which the other party to the contract has no legal claim, is against public policy and void.” (citing cases)

“Of the many instances in which this court and other courts have sustained agreements for contingent fees for services before Congress and before the departments, the cases, without exception, involved contracts for the prosecution of claims for the collection of debts. They are, without exception, cases for the prosecution of legal causes of action, tried before courts wherever there were courts possessing the jurisdiction to try them, and before congress and the departments where because of the absence of such jurisdiction in the courts, those bodies were appealed to in a quasi judicial capacity, not to make laws, but to pass upon the merits of money demands, and to award execution or provide for their payment to the extent that they were found just and legal.” (citing cases)

The facts of the Hazelton case were that Sheckels owned land he wished to sell to the Government. He

employed Hazelton, a local lawyer, to get Congressional authorization for its purchase, and to provide compensation for Hazelton, agreed that Hazelton, if the legislation should be enacted, should have an option to buy the property from Sheckels at \$9,000. Mr. Hazelton's compensation was to be the difference between \$9,000 and the amount at which he might procure its purchase by the Government. After the governmental purchase was authorized, Sheckels declined to convey to Hazelton, and Hazelton brought his suit for specific performance. Mr. Justice Holmes said:

“But the services contemplated as a partial consideration of the promise to convey were services in procuring legislation upon a matter of public interest, in respect of which neither of the parties had any claim against the United States. An agreement upon such a consideration was held bad in *Providence Tool Co. v. Norris*, 2 Wall. 45, 17 L. ed. 868. *Of course we are not speaking of the prosecution of a lawful claim.*” (Italics ours)

Hazelton, of course, had no claim against the Government; what he wished to do was to sell the land to the Government, and the sale could be accomplished only by legislation.

Appellant in its brief (page 64) states that it can see no difference in principle between an effort to make a sale to the Government and an effort to collect from the Government the value of property already taken and used by the Government. The difference between the negotiation of an original contract between parties neither of whom is under obligation to the other, on the one hand, and the collection of damages or reasonable compensation for property already converted or

taken and used, on the other hand, seems to us too plain and elemental to argue about. Appellant, however, apparently appreciates that it must convince this Court that there is no distinction else its appeal fails on this point.

Rather than use our own words to describe the situation in which Telefunken found itself when it hired these lawyers in 1922, we quote from the report made June 4, 1934, to the House of Representatives by the Committee on Ways and Means which had under consideration an amendment to the Settlement of War Claims Act (H. R. No. 1924, 73d Congress, 2d Session):

“The United States Government * * * acquired for its own use during the war a large number of patents and a radio station. The United States recognized a duty to make compensation on these accounts to the German nationals for the value of their property so taken and used. The Settlement of War Claims Act created the office of War Claims Arbiter and authorized the Arbiter to hear the claims of the German nationals and to determine the fair compensation to be paid by the United States. Some provision had to be made for the payment of the amounts determined to be due.”

In view of the large number of cases in which attorneys have taken claims against the Government on a contingent compensation without regard to whether Congress had already set up a tribunal before which they could prosecute their claims, or whether, on the other hand, they needed first to present the matter to Congress, and in view of the approval given by the courts to such contracts and their enforcement even though the compensation is purely on a contingent and percentage basis, it would be a startling and upsetting decision which would deny recovery in a case where

no improper means had been contemplated or used and solely on the ground that the compensation was contingent.

Among the many cases in which agreements for contingent compensation for obtaining legislation about a claim have been held valid is *McGowan v. Parish*, 237 U. S. 285, 59 L. ed. 955. There Judge McGowan, a Washington lawyer, contracted to render his professional services to the claimant Parish for a fee equal in amount to fifteen per centum of whatever might be collected. An additional lawyer, Mr. Brookshire, being employed, an additional five per centum of whatever should be awarded or appropriated was agreed to be paid. As in the present case, after rendering substantial service, the lawyers were discharged. In describing the services rendered the Supreme Court said:

“Thereafter McGowan and Brookshire cooperated, and unquestionably rendered services of value. Through their instrumentality, Congress was induced to pass the act of February 17, 1903 (32 Stat. at L. 1612, Chap. 55), referring the claim to the Secretary of the Treasury for examination and the payment of any balance found due to Parish under the rule of damages laid down by this court in *United States v. Behan* * * *.”

The Supreme Court found that inasmuch as the services were of value and resulted in securing to Parish “a complete right to the payment of the money, and since it was his fault, and not theirs, that the final steps to recover it were not taken by them, no reason is shown why complainants should not receive the entire amount stipulated for in their contracts.”

In *Spalding v. Mason*, 161 U. S. 475, 40 L. ed. 738, an accounting was allowed of fees due for claims requiring the procurement of legislation.

The propriety of such charges has even received legislative recognition in statutes passed to limit the amount of such allowances. See *Calhoun v. Massie*, 253 U. S. 170, 64 L. ed. 843.

Appellant refers in its brief (p. 66) rather fully to the case of *Stanfield v. Vollbehr*, 61 App. D. C. 239, and to our brief as attorneys for Dr. Vollbehr in that case. We fail to see how any considerations advanced by us in that case help the appellant. The services for which Stanfield was there claiming compensation were services in inducing a purchase by the Government of valuable incunabula owned by Dr. Vollbehr, a purchase which had to be authorized by legislation. Stanfield's service was more like that of a broker—he was making a sale—he certainly was not prosecuting a claim. Our brief in the Vollbehr case takes precisely the same position we take in this case as to the distinction between contracts for the prosecution of claims, on the one hand, and those for the making of sales or other contracts, on the other. It is the position the authorities compel.

Appellant in its brief (p. 68) contends that the present case was not one of the prosecution of a claim. Appellant attempts to draw a distinction between cases in which the parties have against the Government lawful claims and those in which the Government owes the parties merely moral obligations, and appellant asserts that the Government owed it merely a moral obligation as distinguished from a lawful claim. Supporting its view, appellant says that its case against the Government was analogous to that involved in *Burke (Trist) v. Child*, 21 Wall. 441, 22 L. ed. 623, where, appellant says, was involved a moral obligation and not a claim. The attempted distinction is certainly without merit, but it is interesting to note that

the opening sentence in the opinion in *Burke v. Child* is "Nicholas P. Trist had a claim against the United States for his services touching the Treaty of Guadalupe Hidalgo." What the appellant is trying to support is an argument which amounts to saying that a claim is not a lawful claim unless it is enforceable. This would mean that a claim is not a claim if it has to be presented to Congress at all. And the Court will remember that what was condemned in *Burke v. Child* was the character of the services proposed to be rendered and the means proposed to be used by the lobbyist who was employed. The court quoted as typical of the transaction the attorney's letter in which he said: "Even if he knows a page, for a page often gets a vote." The court plainly said that an agreement "for purely professional services is valid", and as to professional services said: "All these things are intended to reach only the reason of those sought to be influenced. They rest on the same principle of ethics as professional services rendered in a court of justice, and are no more exceptionable."

An examination of the authorities will show that without exception where a contract for professional service for a contingent compensation has been struck down in a claims case, it has been upon the ground of the character of the services as being those not calculated to appeal to the reason and not of the kind described in the findings of fact in the present case.

In our own consideration of this matter and in the presentation of it to the court below, we found useful a chronological arrangement of the cases in which the matter of the procurement of legislation or similar action for a contingent compensation had been considered. The cases we so arranged and considered, together with a brief indication of what seemed to us

to be the salient points of each, and in some cases quotations from the opinion, are as follows:

- | | |
|-------------------------------------|---|
| 1853
Claim case | Wylie v. Coxe, 15 How. 415, 14 L. ed. 753. Here there was a 5% contingent contract to prosecute a claim against Mexico. Services were before the State Department and after an act of Congress before a Commission. We do not consider this case important or significant. |
| 1853
A grant not
a claim case | Marshall v. B. & O., 16 How. 314, 14 L. ed. 953. Here the B. & O. sought a legislative grant of a right of way from the Virginia Legislature. Marshall's compensation was contingent. He concealed his representation and the court's condemnation of the agreement for contingent compensation is coupled with its condemnation of the deceit practiced by the advocate in concealing from the Legislature that he was so hired. |
| 1864
Contract case | Providence Tool Co. v. Norris, 2 Wall. 45, 17 L. ed. 868. Here there was an agreement to pay compensation for procuring a contract from the War Department for the purchase of muskets. The point of the case was that the same rule is applicable to the executive departments as to the legislature. |
| 1874
Claim case | Burke (Trist) v. Child, 21 Wall. 441, 22 L. ed. 623. Here Trist had a twenty year old claim against the United States for services and made a 25% contingent agreement with Child contemplating distinctly lobbying services. "Even if he knows a page, for a page often gets a vote." "The agreement * * * was for the sale of the influence and exertions of the lobby gentleman to bring about the passage of a law for the payment of a private claim, without reference to its merits, by means which, if not corrupt, were illegitimate * * *." |

1875
Claim case

Wright v. Tebbits, 1 Otto (91 U. S.) 252, 23 L. ed. 320. Here on appeal from the Supreme Court of the District of Columbia, there was upheld 10% contract for prosecuting claim against Choctaw Nation of Indians before Commission set up by treaty. (p. 253) "To deprive a claimant of the means of obtaining such professional service would be to deprive him in many instances, of the means of asserting and enforcing his claim." Trist v. Child was quoted (p. 254).

1875
Claim case

Stanton v. Embrey, 3 Otto (93 U. S.) 548, 23 L. ed. 983. Here were involved services in prosecuting a claim against the United States before the accounting officers of the Treasury for contingent compensation. (p. 556) "Coming to the merits, the first objection of the defendants is that the contract set up in declaration is one for a contingent compensation. Such a defense, in some jurisdictions, would be a good one; but the settled rule of law in this court is the other way. Reported cases to that effect show that the proposition is one beyond legitimate controversy." (citing Wiley v. Cox and Wright v. Tebbits). (p. 551) "Contracts for lobbying stand upon a very different footing." (citing Trist v. Child) "Professional services, to prepare and advocate just claims for compensation, are as legitimate as services rendered in court."

1880
Contract case

Oscayan v. Winchester Repeating Arms, 13 Otto (103 U. S.) 261, 26 L. ed. 539. Oscayan was Consul-General of Ottoman Government at New York when he claimed to have earned a commission by procuring a sale to his Government. "It is the naked case of one officer of a government, to secure its purchase of arms, selling his influence with another officer in consideration of a commission on the amount of the purchase."

- 1883
Claim case
Taylor v. Bemiss, 110 U. S. 42, 28 L. ed. 64. Here was upheld a 50% contract for the prosecution of a claim against the United States before the Southern Claims Commission. (citing Stanton v. Embrey, *supra*.) "And the well known difficulties and delays in obtaining payment of just claims which are not within the ordinary course of procedure of the auditing officers of the government, justifies a liberal compensation in successful cases where none is to be received in case of failure."
- 1895
Claim case
Ball v. Halsell, 161 U. S. 475, 40 L. ed. 622. Here was upheld a provision in an act of 1891 providing for payment of claims limiting counsel fee to what the Court of Claims may allow. Counsel had a 50% contract. "By several decisions of this court, indeed, beginning at December term, 1853, contracts for contingent fees, by which attorneys employed to prosecute claims against the United States were to be allowed a proportion of the amount recovered in case of success, and nothing in case of failure, were held to be lawful and valid." (citing many cases)
- 1895
Claims but no discussion
Spalding v. Mason, 161 U. S. 475, 40 L. ed. 738. Accounting decreed of fees due for procuring legislation to pay postmaster claims. (No point raised)
- 1902
Salary change, not strictly a claim
Owens v. Wilkinson, 20 App. D. C. 51. The contract provided that the lawyer should get 50% contingent fee if he was successful in getting the Navy pay law changed so as to pay a larger longevity compensation to the client, a surgeon in the Navy. The lawyer employed a firm to render services of which he had no knowledge but he (p. 55) "got them because they knew their business". Discussion of facts and use of Trist v. Child indicates what the court was condemning was "personal influence", "personal solicitation" and methods used by lobbyists.

- 1905
Accounting
case
Waggaman v. Earle, 25 App. D. C. 582, 588. Whereby a percentage contingent fee on French Spoliation Claims involving Congressional appropriations was not attacked but lobbying services by three persons employed without proof of what they did disallowed as illegitimate.
- 1905
Claim case
Important
Nutt v. Knut, 200 U. S. 12, 50 L. ed. 348. Contract for 33-1/3% for prosecution of claim against the United States (p. 13) "or before the Congress of the United States"; (p. 15) attacked as contrary to public policy and (p. 16) as lobbying. (p. 15) Plaintiff's labors resulted in appropriations. The court followed the findings below that the services rendered were not lobbying services and permitted recovery. (Note that if contingent compensation in contract had rendered it illegal, character of service would have been immaterial.)
- 1905
Contract case
Hazelton v. Sheckels, 202 U. S. 71, 50 L. ed. 939. Contract to procure purchase of land by United States for contingent compensation. Claim cases distinguished in Darlington's argument. Not one claim case cited in Holmes' opinion but contract cases cited (Trist v. Child not cited, because Holmes knew it was governed by different principle). This case is quoted from *supra*.
- 1905
Claim case
Stroemer v. Van Orsdel, 74 Neb. 132, 4 L. R. A. (N. S.) 212. Contingent 10% contract, incidentally involving procuring of legislation by Congress, held not invalid. Relying upon Trist v. Child and other claim cases above.
- 1908
Contract case
Burke v. Wood (C. C. S. D. Alabama), 162 F. 533. Cited by Telefunken. Services in procuring sale of waterworks to a municipality by lobbying. Defined at page 537 as use of "personal influence and improper or corrupt methods."

1913
Contract case

Valdes v. Larrinaga, 233 U. S. 706, 709, 58 L. ed. 1163. 10% contract to Assistant Secretary (who ceased to be such) of Department of Interior at Porto Rico for assistance in getting a concession from military governor and Secretary of War. "The things done * * * have no sinister smack." Contract not against policy of law.

1914
Claim case
Important

McGowan v. Parish, 237 U. S. 285, 59 L. ed. 955. 15% contract for prosecution of claim by McGowan (p. 287). (p. 288) McGowan and Brookshire induced Congress to pass Act of 1903, referring claim to Secretary of Treasury. Recovery allowed. This case is quoted from *supra*.

1915
Contract case

Croker v. U. S., 240 U. S. 74, 60 L. ed. 533. Lorenzo employed to get a *contract* on contingent compensation (pp. 78-79).

1919
Claim case

Calhoun v. Massie, 253 U. S. 170, 64 L. ed. 843. Provision in Omnibus Claims Act of 1915 limiting fees on claims there appropriated for to 20% upheld.

1920
Claim case
Important

Winton v. Amos, 255 U. S. 373, 392-3, 65 L. ed. 684, 695. Indicates wide scope of proper legislative efforts, and propriety of award for them. Services to Indian Tribe before Congress and its Committees, individual Representatives and Senators—"not lobbying in the odious sense".

1923
Claim case

Stansull v. Roach, 147 Tenn. 183, 29 A. L. R. 143. 10% contract for procuring legislation. Claim cases cited and construed, particularly on contingent compensation.

1927
Contract or
grant case

Steele v. Drummond, 275 U. S. 199, 72 L. ed. 238. Suit for breach of contract. Drummond who owned property to be benefited by extension of railway and service at St. Andrews and agreed, among other things, to procure franchises from town of St. Andrews. Important as appraising cited cases.

1932 Contract case	Stanfield v. Vollbehr, 61 App. D. C. 239, 60 F. (2d) 670. Services claimed for were in inducing Congress to authorize purchase for Congressional Library. Question not passed on because plaintiff failed to prove sale was through his efforts. Case included here because cited by Telefunken.
1934 Rate reduction case, not a claim case	Noonan v. Gilbert, 63 App. D. C. 30, 68 F. (2d) 775. Flat fee, \$1000, contingent on procuring reduction in carfare rates by Utilities Commission or Congress. Contingent element held to make contract void as against public policy on authority cases included above.

CONCLUSION.

It is respectfully submitted: (1) as to the defense founded upon Brown's employment in the office of the Alien Property Custodian, that as a matter of fact he had no connection there with any matter material to Telefunken's claim in the prosecution of which he was subsequently employed, and that, as a matter of law, the mere fact that he had been there employed was no bar to his subsequent employment by Telefunken, particularly in the absence of any objection arising during the course of the employment, and particularly as the question here arises only as a supposed defense to the payment of compensation for services rendered; (2) as to the defense based upon the claim that Telefunken's lawyers "lobbied", this claim is not well founded in fact and is concluded by the finding of fact below; and (3) as to the defense that the provision in the contract for contingent compensation in the event of recovery was against public policy, and therefore that there could be no recovery for services rendered under the contract because the contemplated services

included the obtaining of legislative relief, there is no such rule of law where the contract is for the prosecution of a claim.

It is respectfully submitted that the entry of the judgment below upon the facts there found was correct, that there is no error in the record, and that the judgment should be affirmed.

Respectfully submitted,

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April 1, 1935.

ply to appellee Brown's employment by the Alien Property Custodian. The appellant's brief (p. 42) confirms this as follows:

"While U. S. Revised Statutes, Sec. 190, making it unlawful for any former employee in any of the Government Departments to act as counsel or attorney for the prosecution of any claim against the United States which was pending in any Department while he was such employee, within two years after his leaving the service, has been held to apply only to employees of the regular executive departments, * * *,"

It has occurred to us, however, that this Court may prefer not to adopt this conclusion merely upon concession of counsel. We therefore reproduce below a portion of the brief we filed with the trial judge on this point.

The Statute prohibiting former employees to prosecute claims against the United States within two years after their employment has ceased is Section 99, Chap. I, Title 5, U. S. C. A. (Section 190, R. S.), and is as follows:

"Ex-officers or employees not to prosecute claims in departments. It shall not be lawful for any person appointed as an officer, clerk, or employee in any of the departments, to act as counsel, attorney, or agent for prosecuting any claim against the United States which was pending in either of said departments while he was such officer, clerk, or employee, nor in any manner, nor by any means, to aid in the prosecution of any such claim, within two years next after he shall have ceased to be such officer, clerk, or employee."

This Statute Applies Only to Former Employees of the Executive Departments Enumerated in Section 1 of the Same Title.

Section 1, Chap. I, Title 5, U. S. C. A. (Section 158 R. S.) provides:

Application of provisions of chapter. The provisions of this chapter shall apply to the following executive departments:"

(Here are enumerated the State, War, Treasury, Justice, Post Office, Navy, Interior, Agriculture, Commerce and Labor Departments.)

Section 2, Chap. I, Title 5, U. S. C. A. (Section 159 R. S.) provides:

“Word ‘department.’ The word ‘department’ when used alone, in this chapter, and chapters 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11 of this title, means one of the executive departments enumerated in the preceding section.”

It is clear that these three sections say that Section 99 is limited in its application to former officers or employees of the executive departments. The only question is whether these sections mean what they say.

This precise question was passed on in 25 Op. Atty. Gen. 6. The specific question involved there was whether a former chief examiner of the United States Civil Service Commission came within the operation of the provisions of Section 190, Revised Statutes. In holding that he was unaffected by the provisions of that section on the ground that its operation is limited by Section 159, Revised Statutes, Acting Attorney General Henry M. Hoyt in an opinion to the Secretary of the Treasury said:

“It is difficult, therefore, to avoid the conclusion that Title IV of the Revised Statutes is limited in its application to those Executive Departments of the Government which are expressly named therein and the Department of Agriculture and the Department of Commerce and Labor which were subsequently included under said title, and that the word ‘department,’ where the same appears in Section 190 of the Revised Statutes has reference solely to one of said Executive Departments of the Government. * * *

“And it may be observed that there are several other bureaus or departments of the Government directly responsible to the President to which the provisions of Title IV have not been made applicable by law.”

Other opinions of the Attorney General in which it is held in general that the term “department” or “executive department” as used in Acts of Congress and in the Revised Statutes means one or more of the several departments enumerated in Section 158 R. S. (Sec. 1, Title, 5, U. S. C. A.) are 22 Op. Atty. Gen. 62; 26 Op. Atty. Gen. 209; and 29 Op. Atty. Gen. 410.

We have found no adjudicated case arising on this question.

This Section Furthermore Not Applicable in the Instant Case Because There Was No Claim Pending When Brown Was Employed.

The Court will recall that appellant had made no claim against the Government nor any department of it, nor against the Alien Property Custodian prior to the employment of Frankenthaler and Brown, and that the employment was at the initiative of appellant not by the procurement of the attorneys (R. 27).

In *Day v. Laguna Land and Water Co.*, 1 Pac. (2d) 448, (Cal. App., 1931), a former internal revenue agent was suing a taxpayer corporation for his fee and the defense was made that he was not entitled to recovery because he came within the operation of Section 190 of the Revised Statutes. The facts were that the plaintiff while in the employ of the Bureau had been directed to check over the income tax returns of the defendant for the years in question but had only made a routine start to do so when he resigned and shortly thereafter was employed by the defendant in connection with its tax matters. Subsequently, an additional tax was assessed against the defendant and the plaintiff was successful in getting this reduced and it was to recover his fee for accomplishing this that he sued.

The opinion deals with two questions, whether Section 190 of the Revised Statutes was applicable and also whether was applicable the Treasury regulation prohibiting a former employee from handling any matter for a claimant which had his personal attention while such employee. The Court held that Section 190 did not apply because no "claim" was pending while the plaintiff was an employee of the Bureau of Internal Revenue, and also that the plaintiff's conduct did not violate the Treasury regulation because *his contact*, while in the Bureau, with the subject matter of the defendant's tax liability *was routine and purely formal, not resulting in the acquiring by him of any confidential information* with regard thereto. Toward the close of its opinion the Court said: "We cannot say that the contract in question was either contrary to law, public policy or good morals."

There is no basis for any contention that Congress intended the rule it laid down to be expanded by judi-

cial decision. It must be assumed that Congress has made the rule as broad and inclusive as it considered in the public interest. There are substantial reasons why Congress should not wish to make such a rule too sweeping. A general bar to subsequent employment of former Government employees might seriously militate against the Government's ability to procure services of competent attorneys. Furthermore, it is a matter of public knowledge that many high officials of integrity have opened offices in Washington on leaving the public service for the purpose of international and departmental practice, and they have doubtless been of assistance to the departments as well as to clients by reason of their knowledge and experience. The Act of Congress is carefully limited in its terms and has not, so far as we know, been extended by judicial decision.

Respectfully submitted,

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